

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, COASTAL TANK LINES,
INC., ET AL., APPELLANTS

vs.

MARSHALL TRANSPORT COMPANY, WARREN C.
MARSHALL, REFINERS TRANSPORT TERMINAL
CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND

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1 In the United States District Court for the District
of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT CO., INC., A MARYLAND CORPORATION,
WARREN C. MARSHALL, AND REFINERS TRANSPORT & TERMINAL
CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS
vs.

UNITED STATES OF AMERICA, DEFENDANT

Complaint

Filed Sept. 10, 1943

1. This suit is brought under Title 28, U. S. Code, Section 41, subdivision 28 and Sections 43, 44, 45, 46, 47, 47a and 48, and under Title 49, U. S. Code, Sections 17 (9) and 305 (g) (h) (being Section 17 (9) and 205 (g) (h) of the Interstate Commerce Act), to enjoin, set aside, annul and suspend a decision, order, or requirement of the Interstate Commerce Commission entered in September 1943 (copy of which is attached hereto as Exhibit C), in a proceeding pending before said Commission, designated "Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall," Docket No. MC-F-1936, as hereinafter more particularly alleged, and to request this Court to enforce by writ of mandatory injunction the Interstate Commerce Commission's taking jurisdiction of the application filed in said proceeding.

2. Plaintiff Marshall Transport Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business at Glen Burnie, Anne Arundel County, Maryland, which is located in that district of the District Court of the United States of
2 America known as the District of Maryland, and is one of the parties upon whose petition the order of the Interstate Commerce Commission hereinafter mentioned was made.

3. Plaintiff Warren C. Marshall is a resident of Upper Darby, Pennsylvania, and is a citizen of the United States of America.

4. The Interstate Commerce Commission under Sections 206-207, Part II of the Interstate Commerce Act (U. S. Code, Title 49, Sections 306-307) has issued a certificate of public convenience and necessity bearing its No. MC-3003 to plaintiff Marshall

Transport Co., Inc., as successor in interest to the motor carrier operations of plaintiff Warren C. Marshall, under the "grandfather" clause. Said certificate of public convenience and necessity authorizes operations in interstate commerce as a motor-vehicle common carrier of petroleum products, in bulk, in tank trucks, over irregular routes, from Baltimore, Maryland, to points in Delaware, those in Pennsylvania on, south and east of U. S. Highways 422 and 11, those in Accomac County, Virginia; and those in the Washington commercial zone as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243, returning with no transportation for compensation except as otherwise authorized.

5. Plaintiff Refiners Transport & Terminal Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its office within the State of Delaware at 100 West Tenth Street, Wilmington, Delaware, and with its operating offices at 2111 Woodward Avenue, Detroit, Wayne County, Michigan, and is a common carrier by motor vehicle of petroleum and petroleum products, subject to the Interstate Commerce Act. It holds from the Interstate Commerce Commission a certificate of public convenience and necessity and other operating authority issued under Sections 206-207, Part II of said Interstate Commerce Act (U. S. Code, Title 49, Sections 306-307) bearing Interstate Commerce Commission No. MC-50069 and various subnumbers thereunder. The territory within which such operations are authorized and conducted is located in, Michigan, Ohio, Indiana, Illinois, Wisconsin, Missouri, 3 Kentucky, Pennsylvania, and West Virginia.

6. On or about the 8th day of July 1942 the plaintiffs Marshall Transport Co., Inc., and Warren C. Marshall made and entered into a contract with plaintiff Refiners Transport & Terminal Corporation, wherein and whereby they as vendors agreed to sell and Refiners Transport & Terminal Corporation agreed to purchase, subject to the approval of the Interstate Commerce Commission, the above-mentioned operating rights and other carrier properties of Marshall Transport Co., Inc., and Warren C. Marshall. Thereafter an application was filed by plaintiffs with the Interstate Commerce Commission for authority to consummate the sale and purchase pursuant to said contract. Said application was filed on a form "BMC-44", being the form prescribed by an order of the Interstate Commerce Commission dated November 12, 1940, to be used for applications for authority under Section 5, Interstate Commerce Act.

7. Said transaction was proposed and said application for authority to purchase as aforesaid was filed under Sections 5 (2) and 5 (13) of the Interstate Commerce Act (U. S. Code, Title

49, Sections 5 (2) and 5 (13)), which said Section 5 (2) provides in part as follows:

"(a) It shall be lawful, with the approval and authorization of the commission, as provided in subdivision (b) * * * (i) for any carrier to purchase * * * the properties * * * of another * * *"

"(b) Whenever a transaction is proposed under subparagraph (a), * * * the carriers * * * seeking authority therefor shall present an application to the commission * * *"

8. Said interstate Commerce Commission held a hearing on said application at Baltimore, Maryland, on October 15 and 16, 1942, before one of its authorized Examiners, at which hearing certain other carriers and the Department of Justice appeared in protest to the granting of said application. Subsequently an Examiner's proposed report and order was entered in said proceedings in accordance with the custom and practice of the Interstate Commerce Commission. Said report proposed to grant the authority requested in said application.

4 9. Thereafter exceptions to said proposed report and order were filed by protestants, and in accordance with the practice and procedure of the said Interstate Commerce Commission, briefs were filed and oral arguments were heard by Division 4 of said Interstate Commerce Commission, following which said Division 4 entered an order dated April 5, 1943, granting authority for consummating said purchase. A true copy of said order and the supplemental report accompanying the same is hereto attached as Exhibit A.

10. Subsequently, on petition of protestants, an order was entered granting a reconsideration and rehearing in said proceeding, and the matter was heard on oral argument by the Interstate Commerce Commission on May 28, 1943.

11. On the 12th day of August 1943 there was served upon plaintiffs a report of the Commission on reconsideration, dated August 3, 1943, finding and concluding that said application could not lawfully be approved because it was filed by Refiners Transport & Terminal Corporation instead of being filed by the owner of 82.6% of the total issued and outstanding capital stock of said Refiners Transport & Terminal Corporation, such stock interest being owned by Union Tank Car Company, a New Jersey corporation. Entry of the order dismissing said application was postponed for 20 days in order to afford an opportunity for said stockholder, Union Tank Car Company, to file an application for the desired authority. Union Tank Car Company did not file an application and in September 1943 an order was entered dis-

missing said application, effective October 17, 1943. A copy of said report dated August 3, 1943, is attached hereto as Exhibit B and a copy of said order of dismissal is attached hereto as Exhibit C.

12. The transaction proposed as aforesaid falls directly within the provisions of Section 5 (2) (a) of the Interstate Commerce Act hereinbefore quoted, making it lawful for any carrier to purchase the properties of another carrier upon the approval and authorization by the Interstate Commerce Commission. Said application for authority to consummate such transaction was
5 filed by the "carriers" seeking such authority, as specified by Section 5 (2) (b) quoted as aforesaid. Said Union Tank Car Company is not a necessary party applicant to said proceeding.

13. The filing of such application by Refiners Transport & Terminal Corporation, the corporate motor carrier purchaser, was not only in accordance with said statute above quoted, but also in accordance with a long line of decisions and the settled practice and procedure of the Interstate Commerce Commission in such matters. The application filed as aforesaid was in the form prescribed by the Interstate Commerce Commission by its order of November 12, 1940. The decision and order that the application be dismissed because it was not filed by Union Tank Car Company, a stockholder of one of the applicants, is not consistent with or warranted by any statute, or by any prior decision, rule or practice heretofore followed by said Interstate Commerce Commission.

14. The finding by the Interstate Commerce Commission that Union Tank Car Company should be a party applicant, and dismissing said application because it was not filed by the said stockholder, Union Tank Car Company, is contrary to law.

15. The purchase of said operating rights and properties of Marshall Transport Co., Inc., and Warren C. Marshall by Refiners Transport & Terminal Corporation is within the scope of subparagraph (a) of Section 5 of Part I of said Act and would be consistent with the public interest, and said application should not be dismissed.

16. Plaintiffs filed with said Interstate Commerce Commission an application for temporary authority under Section 210 (b), Part II, of Interstate Commerce Act (U. S. Code, Title 49, Section 310 (b)). On or about August 20, 1942, an order was entered granting such temporary authority for a period not to exceed 180 days and expiring about February 17, 1943. Said Interstate Commerce Commission on February 12, 1943, entered an order

6 granting authority under Section 5 (2) (a) of the Interstate Commerce Act, for Refiners Transport & Terminal Corporation to carry on said Marshall operations under a lease of said operations and properties for an additional period of 90 days, and thereafter on petition duly filed, on or about May 20, 1943, said Interstate Commerce Commission entered a supplemental order granting authority for a period not exceeding 90 days to carry on said operations under a lease made by the parties dated May 17, 1943. Said lease provided for a term of one year from May 17, 1943, and on August 18, 1943, upon petition duly filed by Refiners Transport & Terminal Corporation said Interstate Commerce Commission entered a second supplemental order authorizing said lease of said operating rights and properties, for a period of 60 days from August 18, 1943.

17. Pursuant to said orders of the Interstate Commerce Commission as aforesaid and said leases, Refiners Transport & Terminal Corporation on or about September 1, 1942, took over said operating rights and properties of Marshall Transport Co., Inc., and Warren C. Marshall, and have been and now are serving the public and carrying on such operations. Among those served in such operations are Army, Navy, Coast Guard, and other governmental agencies engaged directly in the war effort.

18. The authority granted as aforesaid under Section 5 (2) (a) (i) for Refiners Transport & Terminal Corporation to operate under said lease is based in part upon said BMC-44 application which was dismissed by said September 1943 order of the Interstate Commerce Commission, a copy of which is attached hereto as Exhibit C, and if said order dismissing said application is not suspended and the effect thereof restrained, the authority to operate under said lease will cease and terminate, and thereupon Refiners Transport & Terminal Corporation cannot lawfully continue to conduct said operations, and the rights and duty to carry on such operations would revert to Marshall Transport Co., Inc.

7 However, Warren C. Marshall, president, principal stockholder and executive of Marshall Transport Co., Inc., is a sick man and is unable physically to resume the conduct of said operations in behalf of Marshall Transport Co., Inc., and said corporation has neither the personnel nor the finances necessary to take over and resume said operations.

If Refiners Transport & Terminal Corporation ceases to carry on and conduct said Marshall operations under its said lease as aforesaid, the operations authorized by said certificate would be interrupted and such interruption might be claimed to constitute an abandonment of said operating rights, to the irreparable damage and injury of plaintiffs herein.

If Refiners Transport & Terminal Corporation ceases to conduct said Marshall operations under its said lease as aforesaid, there would be interruption and discontinuance of the service now being rendered to the public thereunder, including that rendered to or for the benefit of the military forces and other governmental agencies, all to the irreparable damage and injury to the public as well as the plaintiffs herein. The continuance of such service is vital to the war effort.

19. Unless a temporary restraining order and a temporary injunction be issued by this Honorable Court enjoining enforcement of said order of the Interstate Commerce Commission dismissing said application, the operations now being conducted by Refiners Transport & Terminal Corporation under its said lease as aforesaid will cease and be terminated, to the irreparable damage and injury of the public, the war effort, and the plaintiffs herein.

20. That unless said decision and order dismissing said application is suspended and set aside, irreparable damage, injury, and inconvenience will be done to the war effort, the public, and plaintiffs.

21. Unless a temporary injunction be issued by this Court suspending said order of dismissal and restraining the operation thereof, there will be no application pending before said Commission upon which said Commission could grant an extension of authority to plaintiffs to operate under said lease.

8. Wherefore, being without an adequate remedy at law and plaintiffs relief being in this Court, and in order to prevent immediate and irreparable loss to plaintiffs, and great and irreparable damage and inconvenience to the public, plaintiffs pray this Court for relief as follows:

A. That process issue against the United States of America as provided by law.

B. That this Court as soon as practicable after the filing of this Complaint call to its assistance for the hearing and determination hereof two other Judges, one of whom shall be a Circuit Judge.

C. That this Court issue a temporary restraining order and temporary injunction staying and suspending and restraining the enforcement and the operation of, and setting aside, the 'said order of the Interstate Commerce Commission entered' in September 1943, a copy of which as Exhibit C is attached hereto, and enjoining any action whatsoever which would prevent or interfere with Refiners Transport & Terminal Corporation continuing operations under its lease with Marshall Transport Co., Inc., and Warren C. Marshall, and from refusing to take any action necessary to enable plaintiffs lawfully to continue to

operate under the said lease, pending the final hearing and determination of this suit.

D. That a temporary restraining order and a temporary injunction be entered herein restraining, enjoining, and suspending until the further order of this Court the operation, execution, effect, and enforcement of said September 1943 order of the Interstate Commerce Commission, a copy of which is attached hereto and made a part hereof as Exhibit C.

E. That upon its final hearing herein this Court adjudge said order of the Interstate Commerce Commission to be null and void and shall enjoin, set aside, annul, and suspend the whole of said order, and issue its writ of mandatory injunction enforcing the Interstate Commerce Commission's taking jurisdiction of said application filed as aforesaid.

F. For such other further or different relief as to the Court may seem proper in the premises.

JOHN T. MONEY,

John T. Money,

*Attorney for Marshall Transport Co., Inc.,
and Warren C. Marshall, plaintiffs herein.*

ROBERT W. WILLIAMS,

*A member of and in behalf of the firm of
Ritchie, Janney, Ober & Williams.*

GEORGE H. KLEIN,

George H. Klein,

BIGHAM D. EBLEN,

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*Attorneys for Refiners Transport & Terminal Corporation,
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John T. Money, 801 Mills Building, Washington, D. C., Attorney for plaintiffs Marshall Transport Co., Inc., and Warren C. Marshall.

Ritchie, Janney, Ober & Williams, Baltimore Trust Building, Baltimore, Maryland; George H. Klein, Bigham D. Eblen, and Robert C. Winter, 2850 Penobscot Building, Detroit, Michigan; Harry S. Elkins, 930 Munsey Building, Washington, D. C., Attorneys for plaintiff Refiners Transport & Terminal Corporation.

11 [Duly sworn to by Edward S. Turner; jurat omitted in printing.]

Exhibit A to complaint

INTERSTATE COMMERCE COMMISSION

No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Submitted February 26, 1943.—Decided April 5, 1943

Purchase by Refiners Transport & Terminal Corporation of operating rights and property of Marshall Transport Co., Inc., and certain property of Warren C. Marshall, approved and authorized, subject to condition. Prior report — M. C. C. —, decided February 12, 1943

Appearances shown in prior report.

SUPPLEMENTAL REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

In the prior report, — M. C. C. —, decided February 12, 1943, and solely as a temporary measure to allow time for oral argument of the issues here involved, we authorized, under section 5 (2) (a), least¹ by Refiners Transport and Terminal Corporation of the considered properties of Marshall Transport Co., Inc., and Warren C. Marshall for a period expiring May 17, 1943. The case has been orally argued.

Refiners Transport & Terminal Corporation, a Delaware corporation, of Detroit, Mich., and Marshall Transport Co., Inc., of Glen Burnie, Md., herein called Refiners and Transport, respectively, by joint application filed August 3, 1942, seek authority under section 5, Interstate Commerce Act, for purchase by the former of operating rights and property of the latter. As part of the transaction Refiners would also purchase certain equipment and terminal properties of Warren C. Marshall, of Upper Darby, Pa., used by Transport in the conduct of its operations. Hearing

¹ Pursuant to authority granted under section 210a (b) August 20, 1942, Refiners leased the properties of Transport and Marshall, which it here seeks authority to purchase, for a period which expired February 15, 1943, at a rental of \$100 per month which is to be applied on the purchase price. Operations were instituted under the lease September 1, 1942. Petition of certain protestant motor carriers for revocation of the temporary authority granted under section 210a (b) was denied by the Commission January 4, 1943. As hereinafter indicated, Refiners took title to, and paid the purchase price for, certain of Marshall's equipment prior to grant of temporary authority under section 210a (b) and such equipment accordingly was not included in the lease.

has been held, at which nine motor carriers² opposed the application, but confined their participation to cross-examination of applicants' witnesses. The Antitrust Division, Department of Justice, intervened. Briefs were filed by applicants and the protesting motor carriers, and the latter and the Antitrust Division filed exceptions to the examiner's proposed report and applicants replied.

13 Refiners conducts operations in interstate or foreign commerce pursuant to certificates in Nos. MC-50 69 (embracing No. MC-50069 (Sub.-No. 1)),³ MC-50069 (Sub.-No. 2), MC-50069 (Sub.-No. 4), and MC-50069 (Sub.-No. 7), issued September 23, December 1 and October 6, 1941, and September 16, 1942, respectively, as a motor vehicle common carrier of gasoline and petroleum products, over irregular routes, principally from Toledo, Cincinnati, Cleves, Lima, and Findlay, Ohio, Detroit, Benton Harbor, and St. Joseph, Mich., East St. Louis, Saint Elmo, Hartford, Selma, Joliet, Lawrenceville, and Robinson, Ill., Pittsburgh and Midland, Pa., East Chicago and Evansville, Ind., Louisville, Latonia, Ashland, and Catlettsburg, Ky., and Huntington, Parkersburg, Cabin Creek, and Charleston, W. Va., as points of origin, to points in defined areas in Illinois, Indiana, Michigan, Missouri, Ohio, and West Virginia, the authorized destination territory being dependent on the point of origin. Pursuant to orders entered in Nos. MC-50069 (Sub.-No. 9TA), MC-50069 (Sub.-No. 11TA), and MC-50069 (Sub.-No. 12TA), on August 27, June 30, and December 8, 1942, respectively, it was granted temporary authority to transport the same commodities from Terre Haute, Ind., Hooven, Ohio, and Leyden Township, Cook County, Ill., as points of origin. In No. MC-50069 (Sub.-No. 13TA), on November 18, 1942, it was granted temporary authority to transport anti-freeze, denatured, and ethyl alcohol, ethyl glycol, and high wines (unfinished grain spirits), over irregular routes, between points in Illinois, Indiana, Kentucky, Ohio, and portions of Pennsylvania, Michigan, Missouri, and Iowa. In No. MC-50069 (Sub.-No. 16TA), on November 24, 1942, it was authorized to transport until December 31, 1944, paint thinner, in bulk, in tank trucks, from Milwaukee, Wis., to Hammond, Ind., and Pullman, Ill. It has five other applications pending under section 5,⁴ seeking to acquire motor-carrier operations in New

² Coastal Tank Lines, Inc., William F. Crossett, Richard F. Kline, Leamon Transportation Company, Clare M. Marshall, M. I. O'Boyle & Sons, a partnership, Petroleum Transport, Shipley Transfer Co., and Vedder Transportation Co.

³ These rights were acquired from its predecessor, Petroleum Transit Corporation, pursuant to authority granted in Nos. MC-FC 14544 and MC-FC 14544-A on February 24, 1941.

⁴ Nos. MC-F-1951, Refiners Transport & Terminal Corporation—Purchase—Leander G. Talt; MC-F-2034, Same—Control—The Collins Transportation Co., Inc.; MC-F-2059, Same—Merger—The Collins Transportation Co., Inc.; MC-F-2100, Same—Purchase—Motor Fuels Transport, Inc.; and MC-F-2128, Same—Purchase—W. T. Holt, Incorporated.

England and in the southeastern portion of the United States. It owns and operates substantially in excess of 20 motor vehicles.

Transport, a Maryland corporation, was organized January 9, 1942, for the purpose of taking over and operating the motor-carrier properties of Marshall. On July 18, 1942, in No. MC-3003, a certificate was issued to Transport,⁸ as successor in interest under the "grandfather" clause, authorizing operations in interstate or foreign commerce as a motor-vehicle common carrier of petroleum products, in bulk, in tank trucks, over irregular routes, from Baltimore, Md., to points in Delaware, those in Pennsylvania 14 on south, and east of U. S. Highways 422 and 11, those in Accomac County, Va., and those in the Washington commercial zone as defined in Washington, D. C., Commercial Zone, 3 M. C. C. 243, returning with no transportation for compensation except as otherwise authorized. At about the time of the above transfer to Transport, Marshall also transferred certain physical property consisting of shop and garage equipment, office furniture and equipment, and material and supplies. However, his automotive equipment and a certain parcel of real estate at Glen Burnie, on which there is a terminal, were not transferred, title to the former having been retained by him allegedly because of unexpired licenses. Prior to Refiners' exercise of the above-mentioned temporary authority, such equipment and terminal properties were being used by Transport under a leasing arrangement. Marshall is president of Transport and owns all of its outstanding capital stock except two qualifying shares. Transport began operations as a motor carrier June 1, 1942. Its entire operations are outside the general territory now authorized to be served by Refiners.

TERMS OF CONTRACT AND FINANCING

By agreement dated July 8, 1942, between Refiners, on the one hand, and Transport and Marshall, on the other, Refiners would purchase, free of encumbrance, the above-described operating rights, shop and garage equipment, office furniture and equipment, and material and supplies owned by Transport, and the automotive equipment, including tires, and terminal property owned by Marshall, for a total consideration of \$142,000, which is subject to certain adjustments as hereinafter described. The nature of

⁸ On April 20, 1942, in No. MC-FC 16277, transfer to Transport from Marshall of rights previously certificated in latter in No. MC-3003, was approved. Additional rights originally granted therein to Marshall, authorizing transportation of petroleum products from four points in New Jersey to points in a defined area in Pennsylvania; and from points in the Philadelphia commercial zone as defined in Philadelphia, Pa., Commercial Zone, 17 M. C. C. 533, and Paulsboro, N. J., to points in defined areas of Pennsylvania, New Jersey, Maryland, and those in Delaware, were acquired by another corporation pursuant to authority granted in Coastal Tank Lines, Inc.—Consolidation, 30 M. C. C. 497.

the physical properties to be transferred and their depreciated book value as of May 31, 1942, are as follows:

10 tractors and 10 trailers (excluding tires)-----	\$31,468
18 tractors and 18 trailers (excluding tires)-----	39,294
Real estate and terminal at Glen Burnie-----	20,654
Service car and equipment-----	201
Tires (most of which are on the above vehicles)-----	11,582
Shop and garage equipment-----	395
Office furniture and equipment-----	608
Material and supplies-----	705
Total-----	\$104,907

Shortly after execution of the contract, Refiners took title to the 10 tractors and 10 trailers first mentioned, including tires thereon with book value of approximately \$5,032, total \$36,500, for which it paid \$40,000* in cash. As to the remainder of the above purchase price, \$102,000, the agreement provides for adjustment in event of approval and consummation by (a) deducting an amount equal to the depreciation on the physical properties, computed from July 1, 1942 to date of taking over of such properties under temporary lease, or otherwise, at rates at which such properties heretofore have been depreciated on Marshall's books; (b) deducting an amount by which the cost of material and supplies shall be less than \$1,000 or by adding the amount by which same shall exceed \$1,000; (c) deducting an amount equal to the depreciated value of any equipment destroyed, damaged, or rejected by Refiners because of Marshall's failure to keep same in good repair; and (d) deduction of the amount of rental paid under the temporary authority. By a supplemental undated agreement, executed on or about July 16, 1942, and filed at the hearing, Marshall would sell one tractor and one semitrailer not included in the above for \$6,000 additional, thus increasing the total purchase price for all of the properties to \$148,000, subject to the adjustments above mentioned.

15 This latter agreement also provides for exclusion from the sale of an underground tank and Sabaco water pump located at the Glen Burnie terminal, and removal and return to the owners of certain meters or calculators now on the equipment. It is further provided that Transport or Marshall, at their own expense, shall accept delivery on 20 new tires now being held for them which will be placed on the equipment to be transferred. Vendors will also accept delivery on 20 additional new tires, for which they have appropriate certificates, provided Refiners furnishes the purchase price thereof. Refiners proposes to finance the purchase through sale of additional capital stock to one or more of its present stockholders, authority for which is sought under section 214, in

*Of this amount \$3,330 was paid directly to Marshall and the remainder was paid in satisfaction of equipment mortgages covering all of the vehicles.

**No. MC-F-1974, Refiners Transport & Terminal Corporation—
Issuance of Stock.**

Transport's balance sheet as of August 31, 1942, shows total assets of \$25,820, consisting of: Current assets \$17,534, principally cash \$3,211, and accounts receivable \$13,065; carrier-operating property, less depreciation, \$3,191; and deferred debits—prepayments \$5,095. Liabilities were: Current liabilities \$22,900, consisting of accounts payable \$18,824, wages payable \$1,821, and taxes accrued \$2,255; capital stock \$10,000; and surplus (debit balance) \$7,080, the latter being the deficit from its operations for the period June 1 to August 31, 1942.

Marshall's balance sheet as of May 31, 1942, which includes certain of the above-mentioned physical property subsequently transferred to Transport and Refiners, shows total assets of \$140,101, consisting of: Current assets \$15,315, principally cash \$5,273, accounts receivable \$7,937, and material and supplies \$705; carrier-operating property, less depreciation, \$100,280; nonoperating property \$3,450; and deferred debits—prepayments \$20,056, and other \$1,000. Liabilities were: Current liabilities \$29,265, principally accounts payable \$25,772; equipment obligations \$45,504; and sole proprietorship capital \$65,332. His income statements for 1940, 1941, and the first five months of 1942 show net income of \$22,890 and \$3,320,¹ and deficit of \$16,522, respectively.

Refiners' balance sheet as of August 31, 1942, which reflects purchase of a portion of Marshall's equipment and payment of the purchase price, shows total assets of \$1,207,198, consisting of: Current assets \$334,550, principally cash \$83,791, accounts receivable \$151,317, and material and supplies \$94,115; carrier-operating property, less depreciation, \$798,153; intangible property, less reserve for amortization, \$14,848; investment securities and advances \$14,725; and deferred debits \$44,922. Liabilities were: Current liabilities \$181,029, consisting of accounts payable \$80,952, wages payable \$26,793, and taxes and insurance accrued \$73,284; capital stock \$981,025; and surplus—unearned \$27,664, and earned \$17,480. Its income statements for 1941 and the first eight months of 1942 show net income of \$7,719 and \$94,000, respectively, before provision for income taxes, and \$6,993 and \$32,905, respectively, after provision for income taxes.

REASONABLENESS OF PURCHASE PRICE

No independent appraisal was made of the equipment to determine its value. However, it was spot checked by Refiners and

¹ The 1940 figure reflects results of Marshall's entire operations including those sold in Coastal Tank Lines, Inc.—Consolidation, supra; and the 1941 figure reflects results of his entire operations until date of consummation in that case on April 1, 1941.

found to be in good condition. Nineteen of the 28 tractors were purchased in late 1939, two in February 1940, and seven in 16 late 1940, at a total cost of \$71,363. Six of the 28 trailers were purchased in December 1938, eight in January 1939, eight in late 1939, and six in late 1940, at a total cost of \$68,141. No information is available on the tractor and semi-trailer covered by the supplemental agreement, but it is represented that they are in good condition. Refiners estimates the present market value of all of the equipment to be substantially in excess of the book value because of present rationing under government regulations and general shortage of tanks and steel for new construction. Marshall has had offers from others for certain units substantially in excess of the average price that is proposed to be paid by Refiners. The latter has been in urgent need of additional equipment to handle its increased business occasioned principally by diversion of rail tank cars to long-haul traffic, necessitating use of available equipment 20 hours per day on the average. The realty in Glen Burnie, on which there is a modern fully-equipped fireproof brick and steel terminal, constructed about two years ago, has a frontage of 300 feet and an average depth of 225 feet. Considering present day conditions and Refiners' urgent needs, we are of the opinion that the price proposed to be paid is not unreasonable. As of August 31, 1942, Refiners proposes to record \$2,345 of the total purchase price in its "Other Intangible Property" account and would immediately write off to surplus the amount so recorded. Our findings contemplate accounting for this transaction in accordance with our uniform system of accounts for Class I motor carriers and will be conditioned to require the immediate write-off to surplus of the amount properly assignable by Refiners to its "Other Intangible Property" account resulting from the instant transaction.

BENEFITS FROM PROPOSED UNIFICATION

Refiners' present traffic consists principally of gasoline, which involves heavy movements during summer months, particularly since the diversion of rail-tank cars as above mentioned. Transport's traffic, on the other hand, predominantly has been fuel oil which moves during winter months. As a result, certain of Transport's equipment has been idle during the season when Refiners is most urgently in need of equipment. A unification of the rights under single ownership would result in a more balanced transportation service through transfer of surplus equipment from the east to the west in the summer, and from the west to the east during winter months, thus relieving equipment shortages which have been more acute in the west, and increasing the use factor of all vehicles.

Marshall has been handicapped in conducting an efficient operation because of ill health. His business also has suffered because the normal means of transporting petroleum products to Baltimore by ocean tankers, from which point he distributed such commodities, has been disrupted due to the submarine menace off the coast and diversion of such tankers to other traffic. This has resulted in certain equipment lying idle. The proposed transfer by Refiners of equipment to the west would relieve this situation somewhat and make possible compliance with request of the Office of Defense Transportation that each vehicle be operated 130 hours a week. Refiners' present executive and administrative personnel would conduct the acquired operations. Economies are in prospect through Refiners' greater purchasing power in acquiring insurance, equipment, repairs and other necessary supplies. The shipping public should benefit by reason of Refiners' improved equipment maintenance program and specialized personnel. All employees of Transport, except Marshall and members of his immediate family, would be absorbed in Refiners' organization. Other motor-vehicle common carriers of petroleum products operate throughout the territory served by Marshall. The proposed manner of financing the purchase would not result in increasing Refiners' total fixed charges.

REFINERS' ORGANIZATION

Refiners is the result of consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value \$10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier.*

* Motor Express, Inc.

It has no stock interest in any other other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latter's tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 percent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents.

PROTESTANTS' MOTION AND CONTENTIONS

At close of the hearing and on brief, protestant motor carriers moved to dismiss the application on the grounds that Union is the real party in interest, and that it is necessary that it be an applicant herein before this Commission may authorize the proposed transaction. This same contention is made in their exceptions, those filed by the Antitrust Division, and at the oral argument. They argue, in effect, that for the purpose of the motion it is immaterial whether Union is a carrier, a person affiliated with a carrier, or a person which is not a carrier, for the ultimate result here would be acquisition by Union, now in control of a carrier, of control of "another carrier," not through stock ownership, but under the "otherwise" provision of section 5 (2) (a) ⁹ of the act. They further argue that failure

⁹ Section 5 (2) (a) provides in part as follows:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"... for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another: * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise: * * *

18 to require Union to be made a party applicant would defeat the purpose of section 5 (3),¹⁰ wherein, they state, it is the plain Congressional intent to subject persons who are not carriers, such as holding companies, but who have been authorized under section 5 to acquire control of one or more carriers, to certain of our regulatory powers under the statute, including the provisions of section 214¹¹ relating to issuance of securities and assumption of obligations of others.

We do not agree with protestants' contention that failure of Union to be made a party applicant herein necessitates dismissal of the application. That Union is not a necessary applicant for control authority herein is in line with our past consistent policy in such cases. Virginia-Carolina Coach Co.—Purchase—Evans, 1-M. C. C. 309, Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo, 5 M. C. C. 479, 36 M. C. C. 325, Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages, 15 M. C. C. 644, and Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 M. C. C. 185. The instant transaction involves purchase by a motor carrier of properties of a motor carrier and, as such, falls directly within the permissive clause of section 5 (2) (a) making it lawful "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another." We are unable to agree with protestants' argument that this transaction falls within the clause of that paragraph making it lawful "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise." Much of protestants' argument is based on construing the words "or otherwise," which were added by the Transportation Act of 1940, as including a purchase or other unification effected by a subsidiary motor carrier of such a noncarrier "person." As we view it, the addition of these words was to embrace methods by which control of an additional separate and continuing carrier could lawfully be effected other than through stock ownership among the other authorized transactions. Compare Suddarth—Purchase—Pettyjohn, 37 M. C. C. 185. Union here controls Refiners, the motor-

¹⁰ Section 5 (3) provides in part:

"Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, section 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issuance of securities and assumption of liabilities of carriers), including in each case the penalties applicable in the case of violations of such provisions." [Italic supplied.]

¹¹ The pertinent portion of section 214 reads:

"Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive of section 20a of part I of this Act * * *." [Italic supplied.]

carrier applicant, and, following the instant purchase, it would continue to be in control of the same single motor carrier. There would be no separate additional carrier under Union's control.

19 In both sections 5 (3) and 214 the word "control" is used. The control therein referred to, like paragraph (2) (a), means through direct or indirect stock ownership, common officers or directors, or some other means whereby the noncarrier person is authorized to acquire control of a carrier (which will thereafter continue as such) in addition to the one already controlled, or of two or more carriers. We conclude, therefore, that the provisions of section 214 would not operate to subject Union to the requirements of section 20a upon our approval of this purchase; and that we are without power, by our order authorizing this purchase, to subject Union to the provisions of the act specified in section 5 (3). In making the foregoing interpretation, however, we are not to be understood as implying that applicant motor carriers in these proceedings are relieved in any way from the necessity of presenting full and complete information as to the person or persons which control their activities, to support the required statutory findings. Protestants' motion is denied.

Protestant motor carriers further contend (1) that Union is a carrier by railroad and (2) that it is affiliated with carriers by railroad and that, accordingly, the application must be denied because no evidence was adduced to sustain the findings required by the proviso of section 5 (2) (b).¹² The Antitrust Division in its exceptions also takes the position that Union is an "affiliate" of railroads. Protestants argue that Union legally is an agency of railroads through whose facilities the latter discharge their common carrier obligations to the public and that Union itself therefore is a carrier; that it makes such cars available to the public indiscriminately¹³ to the extent such facilities are

¹² The pertinent portion of section 5 (2) (b) reads:

"Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Paragraph 6 reads:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

¹³ The instant record shows that Union supplies cars only to those shippers with whom it makes written leases or contracts, and that, on occasion, it takes cars away from such shippers if they are not being utilized to the extent found satisfactory. It does not provide cars to all shippers and may pick and choose those with whom it desires to do business.

available; and that it is only through the medium of railroads that Union can remain in business.

20 The practice of leasing privately-owned cars to shippers and railroads has been one of long standing, and the Commission in a number of cases involving the carrier status of such companies has consistently regarded them as private car companies and not as common carriers. In the Matter of Private Cars, 50 I. C. C. 652, 677, Perishable Freight Investigation, 56 I. C. C. 449, and Guaranty Claim of C., N. Y. & B. Refrigerator Co., 70 I. C. C. 575, 577. In *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, the Supreme Court found that Armour Car Lines, which owned, manufactured, and maintained refrigeration, tank, and boxcars, and leased them to railroads or shippers, but had no control over the motive power or movement of the cars furnished, could not be regarded as a common carrier by railroad subject to the act. The court there said:

"It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself."

Of similar import is the decision in *Chicago Refrigerator Co. v. I. C. C.*, 265 U. S. 292. In *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, decided January 2, 1940 (rehearing denied January 29, 1940), involving a corporation described by the court as unaffiliated with any railroad, which owned and leased tank cars to railroads¹⁴ and to shippers for use in interstate commerce, the court said:

"Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under any obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a

¹⁴ Here also the railroads' tariff provided for payment to the car owner of an allowance while the cars were in the railroads' possession.

position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence." [Footnote reference omitted.]

Protestants, however, rely on opinion of the Supreme Court in *Union Stockyards & Transit Co. v. United States*, 308 U. S. 213, decided December 4, 1939. In that case the court distinguished the situation from *Ellis v. Interstate Commerce Commission*, 21 supra, and held that a stockyard company acting as an agent and performing no rail-haul itself, but which held itself out to the public as performing loading and unloading services at a railroad terminal for shippers and line-haul railroads, was a common carrier engaged in transportation of property by railroad within the meaning of section 1 (3) (a)¹⁵ of the act. In this connection protestants state:

"In these various cases the essential distinction to be observed in determining whether or not the Union Tank Car Company is, by statutory definition, a common carrier by railroad depends upon whether it is an agent of the railroads providing a means of 'transportation,' whether its facilities are available to the general public on the provided terms, and whether it receives compensation from the shippers. The absence of those circumstances in any of the previously decided cases explains the reason for those decisions. The presence of those circumstances, as here, makes the opposite decision in the Union Stock Yard Transit Case the controlling one."

With such contention we cannot agree. In *General American Tank Car Co. v. El Dorado Terminal Co.*, supra, decided less than

¹⁵ Section 1 (3) (a) provides that the term "railroad" shall include "all the road in use by any common carrier operating a railroad * * * all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property * * * including all freight depots, yards, or grounds, used or necessary in the transportation or delivering of any such property." It defines the term "transportation" as including "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, * * * and handling of property transported."

Section 15 (5) provides "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner * * *"

one month after the case next above cited, the tank car company involved was engaged in leasing tank cars to shippers and to railroads in a manner very similar to that followed by Union. As above indicated, such company was found not to be a "carrier or engaged in any public service," and in this respect the conclusion of the court was the same as that heretofore reached by this Commission. In our opinion, there is no basis here for arriving at a different conclusion.

Protestants' further contention that Union and Refiners are affiliated with railroads (no particular railroad is indicated) also is without merit. As above indicated, no shares of stock of Union or Refiners are owned by any railroad, and no officer or director of either has a similar position with any railroad or owns a stock interest therein. Neither Union nor Refiners owns any stock in any other carrier engaged in interstate or foreign commerce. To find that affiliation exists here would be tantamount to saying that any company which manufactures and leases facilities to a railroad is affiliated with such railroad. Union is an independently controlled and managed company engaged primarily in the
 22 business of manufacturing and leasing cars to shippers for profit. Its business is its own and not that of any railroad, and it is not managed in the interest of any railroad. Although Union does lease equipment to railroads, the finding is not warranted that such arrangements, or the circumstances under which the leasing occurs, causes Union to be affiliated with a railroad within the meaning of section 5 (6). It follows that the proviso of section 5 (2) (b) is not applicable to the instant transaction. Protestant motor carriers' further contention that Union is affiliated with or dominated by oil companies who use its cars is not supported by the evidence.

Protestants state further that if all else were laid aside the question would remain whether it would be consistent with the public interest to authorize Refiners to consummate the transaction. They argue that Union is one of the principal instrumentalities through which railroads transport petroleum products, and that its and Refiners' present relationship with oil companies would carry with it a reasonably well-assured patronage of various oil interests, and certainly would not negative patronage of Refiners by oil companies which also do business with Union. This, it is argued, would place Refiners in a preferred position detrimental to other independent tank truck operators. The record shows that approximately 15 percent of Refiners' total traffic moves in interstate or foreign commerce, most of its business being received directly from refineries and marine, and pipeline terminals and

not from tank cars. It has no arrangements whatsoever for through movements via tank car and truck and performs no functions which Union uses as a supplementary service to its tank car business. It is being managed by the same individuals who managed its affairs prior to Union's purchase of its stock. A representative of Union testified in this connection: "We never intended to have this company [Refiners] operated as an adjunct to the Union Tank Car Company, or the Union Tank Car Company operated as an adjunct to it." It is undoubtedly true, as contended by protestants, that certain advantages would accrue to Refiners as a result of its present association with Union and the latter's business connections. However, admitting this to be true, and particularly considering the manner in which the considered commodities are transported and distributed by tank car and truck, it is reasonable to believe that shippers will continue to use the facilities, to the extent available, of those carriers which provide the most efficient and reliable service. Moreover, Refiners, a new operator in the considered territory, would be faced with competition of numerous well-established petroleum haulers. There is no reason for believing that use of the service of existing carriers, if reasonably as good as that rendered by Refiners, would be discontinued in favor of the latter and merely because of Refiners' relationship to Union. Protestants also argue that this is but the first of a series of acquisitions marking an invasion by Union and Refiners of Atlantic Seaboard territory. We shall consider each case on its merits if and when appropriate applications are filed.

We agree with protestants' last contention that purchase and transfer of title to Refiners of a portion of the equipment involved prior to our approval was unlawful. Such equipment is part and parcel of the instant transaction, which covers all of the motor-carrier properties, and which transaction in its entirety is clearly subject to our jurisdiction under section 5. Whether the transaction is embraced in one or several contracts between the parties is not controlling, as asserted by applicant's counsel, of the question as to whether, together, they cover a single or separate transactions. *Wilson Storage & Transfer Co.—Purchase—Dakota Transp.*, 36 M. C. C. 221, and *Spitzer—Purchase—Wicks and Skeie*, 37 M. C. C. 191. However, following those cases, denial of the application solely because of such partial unlawful consummation is not warranted, as the transaction otherwise has been shown to be consistent with the public interest.

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We find that purchase by Refiners Transport & Terminal Corporation of operating rights and property of Marshall

Transport Co., and of certain property of Warren C. Marshall, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5 (2) (a), and will be consistent with the public interest, and that, if the transaction is consummated, Refiners Transport & Terminal Corporation will be entitled to a certificate covering rights granted in No. MC-3003, which rights are herein authorized to be unified with rights otherwise confirmed in Refiners Transport & Terminal Corporation; provided, however, that if the authority herein granted is exercised, Refiners Transport & Terminal Corporation shall immediately write off to surplus the amount of increase in its "Other Intangible Property" account resulting from the instant transaction.

An appropriate order will be entered.

MAHAFFIE, Commissioner, dissenting:

Quite aside from the merit or lack of merit of this application, I disagree with the majority decision that the instant application can properly be approved in the absence of an application by the controlling corporation, Union Tank Car Company.

Approval of this application is based on the clause in section 5 (2) (a) which provides that "It shall be lawful, with the approval and authorization of the Commission as provided in subsection (b) * * * for any carrier * * * to purchase, lease, or contract to operate the properties, or any part thereof, of another."

Reliance upon this clause alone under the facts of the instant case, in my opinion, is to ignore other and more pertinent provisions of section 5. Paragraph (2) (a) also provides that it shall be lawful, with Commission approval, for "a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission." And it is further provided by section 5 (3) that whenever a person which is not a carrier is authorized under paragraph (2) to acquire control of any carrier, such person thereafter shall, to the extent provided by the Commission in its order, be considered as a carrier subject to certain of the provisions of the Interstate Commerce Act, including certain parts of section 20 (a)

and section 214 and part II. Of particular significance is that part of section 5 (4) which provides that "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever."

The above provisions show unmistakably that Congress intended to prevent noncarriers having control of one carrier from further expanding by purchasing or securing control of additional carriers, whether they be competitors or not, without approval by us. Is the instant transaction such a one? The applicant is controlled through ownership of 82.6 percent of its outstanding common capital stock by Union. Approval of the application unquestionably means that Union can control the operating rights, equipment and franchises of the Marshall Transport Co., Inc.,

24 herein called Marshall, which carrier now operates in a field separate from that of the applicant.¹

The majority, while stating that the applicant is controlled by Union, and not disputing that Union will or can control the operating rights, equipment, and franchises of Marshall, take the position that such control is not covered by section 5 since Union, following the instant purchase, would continue to control only a single motor carrier, and that "control" as used in section 5 (2), (3), and (4) should be construed to mean control by a noncarrier of at least one more carrier than it already controls, which additional carrier would continue as a separate carrier after the authorization. Such a narrow construction of "control," in my opinion, is contrary to the meaning of that term as used in the statute.

It is true that the Supreme Court in construing the Clayton Act has held that the word "control" as found in that statute does not include the purchase of assets of the company said to be controlled. It is to be noted, however, that whenever Congress has since had occasion to use that word it usually has characterized it in the broadest terms possible. In *Rochester Tel. Corp. v. United States*, 23 Fed. Supp. 634, affirmed 307 U. S. 125, the court held that the word "control" as used in the Communications Act was to be broadly construed. This construction was adopted by

¹ At this point it also should be noted that the applicant has five other applications pending under section 5, seeking to acquire motor-carrier operations in New England and in the southeastern portion of the United States.

Congress as the definition of control as used in the Interstate Commerce Act.² That this was the intent of Congress is shown plainly by the comprehensive language of section 5 itself. Thus, "control" as used in section 5 (2) (a) includes control not only through stock ownership but also by any other means. And, in section 5 (4) it is provided that acquisition of control without Commission approval is unlawful "however such result is attained" and whether achieved through common directors, officers, or stockholders or "in any other manner whatsoever."

Reading into the statute the meaning that control as used therein does not include control unless the identity of the former owner is continued, in my opinion, largely renders nugatory the provisions of section 5 in respect of acquisition of control of motor carriers by noncarriers. In addition to the possibilities of the procedure so successfully followed in this case, it may be noted that many motor carriers consist of individuals, alone or in partnership. Individuals or partnerships so operating often possess extensive rights. Under the majority's construction, control of most, if not all, of such motor carriers might be acquired by noncarriers without regard to the provisions of section 5 because in practically every instance their acquisition would result in loss of identity. Moreover, the character of most of their financial and business structures is simple even when incorporated. Their stock ordinarily is closely held, and they seldom have outstanding securities evidencing long-term debt. Their terminals are usually rented; their equipment if not fully paid for is covered by a purchase money contract; their other assets often consist of a small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel. Under these circumstances it is quite simple to acquire for cash the "assets," including the certificate and good will, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, as the majority here approve, a noncarrier holding company, or others, may expand at will without becoming subject to our jurisdiction. This, in my opinion, is contrary to the intention of Congress, as plainly stated in the

statute.

The majority report is said to be "in line with our past consistent policy in such cases." I have no reason to think this statement incorrect. But I do not consider that fact an adequate basis for a decision. If our policy as expressed in the reports cited has

² Conference report on S. 2009, August 7, 1940, H. R. No. 2832, 76th Cong., 3rd Sess., page 63.

been wrong as a matter of law it is our obligation to correct rather than to perpetuate the error.

In determining an application under section 5, consideration should be given to the true nature of the undertaking in the light of all of the applicable provisions of section 5. As said in *Overfield v. Pennwood Corp.*, 42 Fed. Supp. 586, 608:

" * * * when a subsidiary corporation does something for the benefit of the parent corporation which has the power to control, it may be inferred that the parent corporation caused the act to be done."

Considered thus, I am satisfied that the instant transaction should not be approved without an application for authorization by Union.

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ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 5th day of April, A. D. 1943

No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That purchase by Refiners Transport & Terminal Corporation, of Detroit, Mich., of operating rights and property of Marshall Transport Co., Inc., of Glen Burnie, Md., and certain property of Warren C. Marshall, of Upper Darby, Pa., be, and it is hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) notify this Commission in writing of the intended consummation date, (2) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (3) confirm, in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, unless the authority herein granted is exercised on or before May 17, 1943, this order shall be of no further force and effect.

It is further ordered, That effective with exercise of the authority herein granted, the order entered herein February 12, 1943, shall be of no further force and effect.

It is further ordered, That recital in said report of balance-sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

It is further ordered, That, before recording the purchase upon its books, Refiners Transport & Terminal Corporation shall submit the related journal entries, in triplicate, to our Bureau of Motor Carriers for approval.

And it is further ordered, That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein.

By the Commission, division 4.

[SEAL]

W. P. BARTEL, *Secretary.*

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Exhibit B to complaint

INTERSTATE COMMERCE COMMISSION

No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—
MARSHALL TRANSPORT CO., INC., AND WARREN C. MARSHALL

Submitted June 7, 1943.—Decided August 3, 1943

On reconsideration found that application of Refiners Transport & Terminal Corporation and Marshall Transport Company, Inc., for purchase by the former of operating rights and property of the latter should be dismissed. Entry of order deferred. Findings in supplemental report herein, 39 M. C. C. 93 (decided April 5, 1943), modified.

Additional appearances: *Tom C. Clark* and *James E. Kilday* for the Antitrust Division, Department of Justice.

Martin Sack for additional protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior supplemental report, 39 M. C. C. 93, decided April 5, 1943, division 4 conditionally authorized, under section 5 (2) (a), the purchase by Refiners Transport and Terminal Corporation, herein called Refiners, of operating rights and property of Marshall Transport Co., herein called Transport, and certain property of Warren C. Marshall.

Motor-carrier protestants and the Antitrust Division, Department of Justice, intervener, herein collectively called protestants, by petitions filed April 15 and April 22, 1943, to which applicants replied, requested reconsideration and further oral argument.¹ By order of May 11, 1943, we reopened the proceeding for reconsideration and further oral argument has been heard. By order entered May 20, 1943, Petroleum Carrier Corporation and Walker Hauling Company, motor-carrier protestants, were permitted to intervene and were represented by counsel at the further oral argument.

29 The purchase authorized in the prior supplemental report was not consummated, and, by supplemental order of May 20, 1943, division 4 authorized Refiners to continue leasing the properties of Transport under section 5 (2) (a) for a further period expiring August 18, 1943, at a rental of \$1,700 per month to be applied on the purchase price, which lease is now in effect.

The facts involved are adequately set forth in the prior supplemental report and will be repeated here only to the extent necessary for clarity of understanding. The following facts, which are not in dispute, are quoted from that report:

"Refiners is the result of a consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) * * *. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value \$10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier [footnote omitted]. It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem

¹ Oral argument was heard by the division prior to its decision.

basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latter's tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. * * *

It has seven officers, who are also its directors; only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock, is usually voted under proxies held by its president and two vice presidents."

At the close of the hearing and on brief, protestants moved to dismiss the application on the grounds that Union is the real party in interest, and that it is necessary that it be an applicant herein before we may authorize the proposed transaction. This same contention was made in their exceptions to the examiner's proposed report, those filed by the Antitrust Division, and at the oral argument, and is now repeated in their petitions for reconsideration. Protestants further contend (1) that the conclusions in the prior report that Refiners and Union are not affiliated with a railroad within the meaning of section 5 (6) is in error because (a) the report fails to make adequate findings of fact to support that conclusion and (b) it is too narrow a view of the meaning of "affiliated" under that paragraph, as a matter of law; (2) that the division erred in finding that each application filed by Refiners to acquire motor carriers may properly be determined, without considering all similar transactions proposed in pending applications of that applicant at the same time; (3) that approval of the transaction in spite of the finding that a portion thereof had already been unlawfully consummated is in error, because no power is conferred by section 5 to approve other than proposed transactions; and (4) that approval of this transaction would result in undue restraint of competition because of the control of Union and the latter's close working arrangement with railroads in the transportation of petroleum by tank car.

In support of their first contention, the protestants argued, in effect, that it was immaterial whether Union was a carrier, a person affiliated with a carrier, or a person which was not a carrier, for the ultimate result would be acquisition by Union, now in control of a carrier, of control of another carrier.² In considering this contention of the protestants, the division, while finding that the applicant is controlled by Union, and not disputing that Union will or can control the operating rights, equipment, and franchise of Marshall, held that the failure of Union

to be made a party applicant did not necessitate dismissal of the application because the proposed transaction is expressly authorized by the permissive clause of section 5 (2) (a) making it lawful "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another." The division further held that this transaction does not fall within the clause of that paragraph making it lawful "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise." [Italics supplied.] The words "or otherwise," which were added by the Transportation Act, 1940, are construed by the division only to embrace methods by which control of an additional separate and continuing carrier would be lawfully effected other than through stock ownership among the other authorized transactions. In other words, the division held that since Union, following the instant purchase, would continue to control only a single motor carrier—Refiners—the instant transaction may be authorized because "control" as used in the statute means control of at least one more carrier than it already controls, which additional carrier would continue as a separate carrier after

32 the authorization. The division also extended that construction of "control" to both sections 5 (3)³ and 214⁴ of the Act.

This interpretation apparently is based on the decision of the Supreme Court in *Federal Trade Commission v. Western Mich. Company*, 272 U. S. 555, wherein the court in construing the Clayton Act held that the word "control" as found in that statute does not include the purchase of assets of the company said to be controlled. It is to be noted, however, that whenever Congress has since had occasion to use the word "control" it usually has characterized it in the broadest terms possible. The word "control" as such has no precise legal or technical meaning. Thus, in *Gulf Refining Co. v. Fox*, 11 F. Supp. 425, 430, it is said:

³ Section 5 (2) (a) provides in part as follows:

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

• • • for any carrier, or two or more carriers jointly to purchase, lease or contract to operate the properties, of any part thereof, of another, • • • or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; • • •

⁴ Section 5 (3) provides in part as follows:

"Whenever a person which is not a carrier is authorized, • • • to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to • • • section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, • • •, and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, • • •"

⁵ The pertinent portion of section 214 reads:

"Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20r of part I of this Act • • •"

“ * * * the word ‘control’ has no legal or technical meaning, and must be given such an interpretation as the Legislature intended it to have, to be ascertained from the connection in which it is used, the act in which it is found, and the legislation of which it forms a part.”

That “control” should be broadly construed in connection with proceedings under the Interstate Commerce Act is not open to question. In *Rochester Tel. Corp. v. United States* 23 Fed.

33 Supp. 634 affirmed in 307 U. S. 125 the court held that the word “control” was to be broadly construed. This construction was adopted by Congress as the definition of control as used in the Interstate Commerce Act,⁸ and the wording of section 5 plainly shows that it was the intent of Congress that noncarriers having control of one carrier should be prevented from further expanding by securing control of additional carriers, whether they be competitors or not, without approval by us. Section 5 (2) (a) provides that not only must such a noncarrier obtain our approval before it secures control of an additional carrier through ownership of its stock, but also by any other means. Section 5 (4)⁹ further provides that acquisition of control without our approval is unlawful “however such result is attained,” and whether achieved “directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust, or in any other manner whatsoever.”

There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company’s franchise and properties through the medium of the already owned subsidiary
34 would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute. As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities out-

⁸ Conference report on S. 2009, August 7, 1940, H. R. No. 2832, 76th Cong., 3rd Sess., page 63.

⁹ Section 5 (4) provides in part as follows:

“It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. * * * As used in this paragraph and paragraph (5), the words ‘control or management’ shall be construed to include the power to exercise control or management.”

standing evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills, etc. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It often is quite simple under these circumstances to acquire for cash the "assets," including certificate and good will, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, a non-carrier holding company, or, others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of "control" as used in the Act.

It is suggested that it is discretionary with us as to whether we should entertain the instant application in the absence of an application from Union, and reference is made to the provisions of section 5 (3) in support of the suggestion. It is true that the provisions of section 5 (3) leave to our discretion the extent to which noncarriers should be subjected to certain provisions 35 of the Interstate Commerce Act. Section 5 (2) (b) provides, however, that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission." The record shows that the proposed transaction is unquestionably one by a person having control of a carrier seeking to secure control of another carrier and, in our opinion, is exactly of the kind that the statute is intended to cover. We are confirmed in this opinion by the fact that applicant now has pending before us five other applications under section 5 seeking to acquire motor-carrier operations in New England and in the southeastern portion of the United States.

It is stated in the prior report that the entertaining of the instant application is "in line with our past consistent policy in such cases." That statement is not entirely correct. See *Warrior & Gulf Nav. Co.*, Control, 250 I. C. C. 26, *Cuyahoga Valley Ry. Co.*, Control, 252 I. C. C. 683, and *Willamette River Towing Company Purchase*, — I. C. C. — (decided July 14, 1943). If we have approved applications in the past where the factual situation as to the point here involved corresponded to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a "policy"

not expressed in the statute itself (*United States v. Illinois Central R. Co.*, 263 U. S. 515; *Southern Pac. R. Co. v. Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 554).

We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party in interest, the controlling corporation, Union. The application should be dismissed.

Entry of an order dismissing the application will be deferred for a period of 20 days from the date of service of this report in order to afford an opportunity for Union to file an appropriate application. In view of this conclusion, further discussion of other contentions now of record is unnecessary.

SPLAWN, Commissioner, concurring:

In this proceeding, a subsidiary of the Union Tank Car Company seeks to purchase a petroleum motor carrier operating in the eastern states. It also has pending before us several other similar applications. Union owns many railroad tank cars which are leased to the railroads and to shippers for the transportation of petroleum products. The compensation for the rental of these tank cars is derived primarily from mileage allowances paid by the railroads directly to it as the owner of the cars.

The record does not disclose the plan or purpose of Union in acquiring control of these several petroleum motor carriers. It is urged by applicant that Union is not a carrier and is not a necessary party to this proceeding. Whether or not this contention is sound, it is clear that Union has close railroad connections and has a very definite interest in the transportation of petroleum by railroad. The burden is on applicant to establish that the proposed transaction is consistent with the public interest. The meager facts of record lend color to the contention of protestants that the proposed transaction is the beginning of an effort to obtain monopolistic control of the transportation of petroleum both by railroad and by motor carrier, contrary to the public interest. In my opinion, applicant has not sustained the burden of showing on this record that the proposed transaction would be consistent with the public interest, and therefore, the application should be denied.

PORTER, Commissioner, dissenting:

Dismissal of this application is proposed by the majority on the ground that it "may not lawfully be approved." This is merely another way of saying that we are without the power to approve this application on the merits because the transaction is not one "within the scope of subparagraph (a)" of section

5 (2). It is found to be not within the scope of that subparagraph because the majority stockholder of Refiners did not sign the application form. But the statute does not require such signature nor do our rules. The application form prescribed by order of division 5 January 10, 1936, for use in purchases such as this one arising under former section 213 contained no requirement and made no provision for any stockholder of the purchaser to join in the application. Similiar form prescribed by order of division 4 November 12, 1940, for seeking purchase authority under section 5 (2) (a), which was the form of application filed in this case, likewise omits any provision or requirement for signature or join-

37 than seven years we have decided hundreds of applications like the instant one without the majority stockholder of purchaser being a party applicant; but suddenly the majority penalize this particular purchaser for following the procedure which we ourselves long since established. (Virginia-Carolina Coach Co.—Purchase—Evans, 1 M. C. C. 309, Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo., 5 M. C. C. 479, 36 M. C. C. 325, Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages, 15 M. C. C. 644, and Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 M. C. C. 185). In the second case above cited, on reconsideration, the Commission approved the application without requiring the signature on the application of that purchaser's sole stockholder, U. S. Truck Lines, Inc., or the latter's majority stockholder, Standard Carloading Corporation, or that company's three stockholders, Erie Land and Improvement Company, Lake Erie Coal Company, Limited and Virginia Transportation Company, or the stockholders of each of those three companies, Erie Railroad Company, Pere Marquette Railway Company, and the Chesapeake and Ohio Railway Company, respectively, or one or more of the stockholders of the last named company, which held stock control of the preceding two companies. Yet, in approving the purchase there proposed, full cognizance was taken of all links in that chain. Insistence upon the signature of the controlling stockholder of a purchasing carrier is not only administratively impractical but wholly unnecessary to determine the issues presented by the proposal to purchase under section 5.

Is this purchase a transaction within the scope of subparagraph (a)? In my opinion it falls directly within the wording of the clause—"for any carrier * * * to purchase * * * the properties * * * of another." The instant purchaser, Refiners, is unquestionably a carrier seeking to purchase the properties of another carrier. In determining that it is not within the scope of subparagraph (a), the majority confuse their con-

sideration of that question with the all-inclusive declaration of illegality contained in section 5 (4), where transactions, whether within or without the scope of subparagraph (a), are made unlawful if effected without our approval. Unquestionably, if the instant purchase transaction were effected without our approval, it would have been effected in violation of section 5 (4) and both Union and Refiners would have participated in that violation. But the question here in issue does not arise under section 5 (4) as this is not a proceeding under section 5 (7). This question arises under section 5 (2) (a), the purpose of which is primarily jurisdictional. If it is not, there would have been no purpose in the Congress requiring that we must find, if we approve the proposed transaction, that it is within the scope of that subparagraph.

The majority emphasize the words "or otherwise," which were added by the Transportation Act of 1940, as supporting their conclusion that the control by Union of the considered properties of Transport and Marshall, which would result from their unification with those of Refiners, is itself a transaction within the scope of subparagraph (a), and must therefore be specifically applied for by Union and authorized specifically by our order.

The history of section 5 as amended June 16, 1933, and of former section 213, which was modeled after section 5, is discussed at some length in Cleveland, Columbus & Cin. Highway, Inc.—Purchase—

Reo, supra. That it was the Congressional intent in enacting former sections 5 (4) and 213 (a) to set forth in those paragraphs those transactions which it intended that we should have the power to approve is apparent from that discussion. Those statutory limitations upon what constitute permissive transactions were preserved in section 5 (2) (a). The addition of the words "or otherwise," only to those clauses of that subparagraph which relate to the bringing of an additional carrier under common control with another carrier, in no way affects our power to approve a purchase transaction. The latter transaction falls directly within the literal wording of the clause relating to purchase of properties of one carrier by another. Under ordinary rules of statutory construction it is clear that the addition of "or otherwise" to the acquisition-of-control clauses in subparagraph (a), and not to all clauses, was intended only to enlarge the acquisition-of-control class of transactions, and without changing the fundamental nature of those transactions, which is, that the carrier of which control would be acquired, either through stock ownership or by other means, retains a separate carrier existence. Such is not the situation in the instant case where only one carrier would emerge from the instant purchase.

This record contains sufficient evidence concerning the stockholders of the purchasing carrier to warrant determination of the proposed transaction on its merits, including the matter of whether such transaction would be consistent with the public interest while the stock and ultimate control is held by Union. That the proposed purchase is a transaction within the scope of subparagraph (a), which we may approve or deny on the basis of the present application and record, is, in my opinion, clear.

I am authorized to state that Commissioner Miller concurs in this expression.

By the Commission.

W. P. BARTEL, *Secretary*.

39

Exhibit C to complaint

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1943

No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—MARSHALL TRANSPORT CO., INC., AND WARREN G. MARSHALL

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on August 3, 1943, having made and filed a report containing its findings of fact and conclusions thereon, with entry of order deferred for 20 days from date of service of said report for the reason therein stated, which report is made a part hereof;

It is ordered, that the application be, and it is hereby, dismissed, effective October 17, 1943.

By the Commission.

[SEAL]

W. P. BARTEL, *Secretary*.

52

In the United States District Court for the District of Maryland

[Title omitted.]

Answer of the United States of America

Filed Sept. 16, 1943

Now comes the United States of America, defendant herein, and in answer to the complaint says:

1. Admits the allegations of paragraphs 1 through 10 of the complaint.

2. Admits the allegations of paragraph 11 of the complaint and for further answer alleges that the Commission made the following ultimate finding and conclusion in its report of August 3, 1943:

"We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party interest, the controlling corporation, Union. The application should be dismissed."

3. Admits the allegations of paragraph 12 except that it denies that Union Tank Car Company was not a necessary party applicant in said proceedings. For further answer alleges that the Commission concluded that this same transaction would also result in the acquisition and control of another carrier by a person which was not a carrier and which already had control of one carrier (namely, Union Tank Car Company, the parent corporation of plaintiff Refiners Transport & Terminal Corporation), and that under section 5 (2) (a) and (b) of the Interstate Commerce Act such a transaction could not be lawfully carried

53 out without an application to the Commission for authority to carry it out by such person. For further answer alleges that such conclusion by the Commission was in all respects valid and justified.

4. Admits that the present decision of the Commission may be inconsistent with some of its former decisions, as alleged in paragraph 13 but alleges that this is of no legal significance and does not disturb the validity of the Commission's present determination.

5. Denies the allegations of paragraph 14.

6. Admits that this transaction is within the scope of section 5 (2) (a) of the Interstate Commerce Act but denies that such transaction would be consistent with the public interest in the absence of a finding to that effect by the interstate Commerce Commission. For further answer alleges that the Commission did not consider the question of public interest here because it held that an application for permission to carry out this same transaction should also have been filed under section 5 (2) (b) by Union Tank Car Company for the reasons above indicated. Denies that under these circumstances the application of plaintiff Refiners Transport & Terminal Corporation should not have been dismissed.

7. Admits the allegations of paragraph 16.

8. Admits the allegations of paragraph 17 except that it alleges that it has no knowledge as to what customers Refiners Transport & Terminal Corporation serves.

9. Admits the allegations of the first paragraph of paragraph numbered 18. As to the remaining allegations of that paragraph

it alleges that it has no knowledge as to the truth thereof, but it denies that plaintiff will suffer any unlawful or irreparable injury if this order is not set aside. For further answer alleges that plaintiff Refiners Transport & Terminal Corporation could have avoided being placed in its present position by having its corporate parent corporation, Union Tank Car Company, 54 file an application under section 5(2)(b) with the Commission within the twenty-day period authorized by the Commission's decision of August 3, 1943.

10. In answer to paragraphs 19 and 20 alleges that although it does not deny plaintiffs' standing to bring this suit, it denies that plaintiff has made the required showing of irreparable injury for the issuance of a temporary restraining order or interlocutory injunction. For further answer alleges that if this case is heard on the merits on September 20, it can, no doubt, be decided before October 17, 1943, the present effective date of the Commission's order. In any event it is the Commission's usual practice on request of a court to extend the effective date of an order pending the decision of a court in a suit attacking the order, making the issuance of a temporary restraining order or an interlocutory injunction unnecessary.

11. Admits the allegations of paragraph 21 but alleges that nothing in the Commission's order prevents Union from now filing an application for approval of this transaction.

Wherefore, it is respectfully prayed that the complaint should be dismissed.

ROBERT L. PIERCE,

Robert L. Pierce,

Special Assistant to the Attorney General,

Washington, D. C.

Counsel for the United States.

WENDELL BERGE,

Assistant Attorney General.

BERNARD J. FLYNN,

United States Attorney.

55

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above answer together with a copy of memorandum brief of the United States upon each of the following by mailing them a copy thereof this 15th day of September, 1943: John T. Money, 801 Mills Building, Washington, D. C.; Ritchie, Janney, Ober & Williams, Baltimore Trust Building, Baltimore, Maryland; George H. Klein, Bigham D. Eblen and Robert C. Winter, 2850 Penobscot Building, Detroit, Michigan; Harry S. Elkins, 930 Munsey Building, Washington,

D. C.; Daniel Kunkel, Esq., Interstate Commerce Commission,
Washington 25, D. C.

ROBERT L. PIERCE.
Robert L. Pierce.

56 In the District Court of the United States for the
District of Maryland

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed Sept. 20, 1943

Now comes the Interstate Commerce Commission, by its counsel, pursuant to authority granted it under the Judicial Code of the United States, 28 U. S. C. 45a, and files its intervention in the above-entitled proceeding.

DANIEL H. KUNKEL, Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

57 In the District Court of the United States for the
District of Maryland

[Title omitted.]

*Answer of Interstate Commerce Commission,
intervening defendant*

(Filed Sept. 20, 1943)

Now comes the Interstate Commerce Commission, intervening defendant, by its counsel, and in answer to the complaint respectfully represents:

1. The averments of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 are admitted.

2. In answer to paragraph 12 of the complaint, it is admitted that the transaction therein referred to falls within the provisions of section 5 (2) (a) of the Interstate Commerce Act, but denies that Union Tank Car Company is not a necessary party applicant to said proceeding.

3. In answer to paragraph 13 of the complaint, it is denied that the settled practice and procedure of the Commission has any bearing upon the issue here involved and further denies that the decision and order of the Commission dismissing plaintiffs' application is not consistent with or warranted by statute.

4. The averment of paragraph 14 of the complaint is denied.

5. Paragraph 15 of the complaint, insofar as it alleges that the application should not be dismissed, is denied. In
58 further answer, it is averred that the question of public interest was not passed upon by the Commission and is not a competent issue before this court.

6. The averments of paragraphs 16 and 17 of the complaint are admitted.

7. In answer to paragraphs 18, 19, 20, and 21, the Commission being without knowledge as to the facts therein alleged neither denies nor admits the same, but denies that the plaintiffs would suffer irreparable injury if the order in issue is not set aside.

8. In further answer to the averments of said complaint the Commission avers that the findings and conclusions contained in said reports and order attached hereto and marked Exhibits A, B, and C, respectively, were and are and each of them was and is fully supported and justified by the evidence submitted in the proceeding before the Commission, and that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including the plaintiffs herein; that said reports and order were not made or entered either arbitrarily or unjustly or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said reports and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the averments to the contrary contained in the complaint.

Except as herein expressly admitted the Commission denies the truth of each of and all the averments contained in the complaint insofar as they conflict either with the averments herein or with the findings and conclusions contained in said reports and orders.

59 All of which matters and things the Commission is ready to aver, maintain, and prove.

Wherefore, the Commission prays that the complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By DANIEL H. KUNKEL, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel,

For Interstate Commerce Commission.

[Title omitted.]

*Petition of Coastal Tank Lines, Inc., et al, for leave to
intervene, and order of allowance*

Filed 20th September 1943

Come now Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, and respectfully show unto the Court as follows:

I

The above-named companies and persons, respectively, intervenors herein, were each parties to the proceedings before the Interstate Commerce Commission involved in the above entitled action, being protestants against the applications of Refiners Transport and Terminal Corporation both in respect to the application of that company for authority to purchase the physical properties, good will and operating rights of Marshall Transport Company, Inc., and Warren C. Marshall, and in respect to the application for authority to operate the properties of the vendors pending hearing and disposition of the main application.

II

As in such cases provided by statute such protestants before the Interstate Commerce Commission now respectfully intervene in this action before the United States District Court for the District of Maryland and further show unto the Court as follows:

III

The order of the Interstate Commerce Commission which the plaintiffs in this action assail dismissed, effective as of October 17, 1943, the application of the plaintiff herein for approval of the purchase of the properties, good will and operating rights involved. That dismissal was upon the ground that the Commission lacked authority to entertain the application unless such an application were to be made by or concurred in by Union Tank Car Company.

It was shown in the evidence before the Commission and was found by it that Union Tank Car Company is one of the larger

owners and operators of railroad tank cars in the United States for the transportation of petroleum. It was further shown in the evidence before the Commission and found by it that Union Tank Car Company concluded sometime ago that in addition to its business of owning and operating railroad tank cars it would also undertake to engage in the business of transporting petroleum by means of tank trucks to be operated upon the highways. To that end it first purchased three tank truck companies operating from refinery locations in Ohio, Michigan, Indiana, and adjoining border points. Those purchases were accomplished by means of the creation by Union Tank Car Company of a corporation having the name Refiners Transport & Terminal Corporation, the capital for which was supplied by Union Tank Car Company which also took most of the capital stock, and out of such capital Refiners Transport & Terminal Corporation acquired the three trucking companies referred to. The small balance of the capital stock was taken by certain of the former owners of these trucking companies, who were retained as operating executives of the trucking enterprise. Thereafter from time to time Union Tank Car Company supplied additional capital to Refiners Transport & Terminal Corporation, receiving additional stock therefor, and out of such further capital additions and improvements to the trucking properties then owned were made. Having in that way inaugurated a large program of tank truck company acquisitions

62 in the middle-west additional agreements thereafter were entered with the owners of other tank trucking companies serving substantially all the refinery locations along the Atlantic seaboard (four additional companies in number), including the Marshall interests involved in this proceeding. The purchase agreements so entered were put in the name of Refiners Transport & Terminal Corporation, the required added capital for the purpose of these further acquisitions to be supplied by Union Tank Car Company. In view of the foregoing facts and considerations it was properly concluded by the Commission that Union Tank Car Company is the real party in interest in this proceeding. It was further concluded by the Commission that whether or not Union Tank Car Company may itself be a common carrier by railroad within the legislative definition of the Interstate Commerce Act or whether it be a noncarrier it is, with respect to the attempted acquisition of the Marshall tank trucking interests, the real and true party in interest. As a consequence the Commission properly concluded that the Commission is without authority to proceed with a consideration of these applications on their merits, if any, unless Union Tank Car Company, as the real party

in interest, shall be an applicant before the Commission for approval authority to acquire under the statute, control of two or more motor carriers, whether such control be direct or indirect or by any manner or means whatsoever, including either the purchase of stock or the purchase of physical assets, good will and franchise operating rights. It was furthermore concluded by the Commission that should Union Tank Car Company become such an applicant and should it receive from the Commission, authority to acquire two or more motor carriers then that the securities issues of Union Tank Car Company would, under the statute, be subject to the jurisdiction of the Interstate Commerce Commission and cease to be subject to the jurisdiction of the Securities Exchange Commission, all in accordance with law, and that such result

63 may not be circumvented through the scheme of having approval applications made only in the name of Refiners Transport & Terminal Corporation which was organized by and is a completely dominated carrier subsidiary of Union Tank Car Company. Intervenors show unto the Court that such order of the Commission dismissing the application was therefore in accordance with the requirements of law and within the authority of the Commission.

IV

This action is now before the Court for hearing in Baltimore September 20, 1943, upon application of the plaintiffs for a temporary stay and for an interlocutory injunction directing the Interstate Commerce Commission not to make effective its order of dismissal of the said application as of October 17, 1943, pending final consideration of this cause by this Court. It is respectfully shown unto the Court that the plaintiffs would not suffer any legal injury should such application for temporary stay and for interlocutory injunction be denied. Therefore, both should be denied. Intervenors show:

V

Under the provisions of Section 210, (b) of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 310b) the Interstate Commerce Commission was not authorized by the statute to grant for a period of more than one hundred and eighty days the right of Refiners Transport & Terminal Corporation temporarily to lease and operate the properties of Marshall Transport Company, Inc., and Warren C. Marshall pending its consideration and decision of the purchase application herein involved. The first order of Division 4 of the Commission, issued August 20, 1942, approving a temporary lease, was of that nature in terms and

expired at the end of one hundred and eighty days. The operations thereafter and now being conducted only by temporary lease were approved only by two of the three members of Division 4 of the Commission. The present purported temporary lease authority therein provided also expires October 17, 1943. Such action of a majority of the membership of Division 4 of the Commission was and remains wholly without legal authority in the statute and is null and void. The recital in such purported unexpired order of the majority of Division 4 that it was made and entered under the provisions of Section 5 of the Interstate Commerce Act (not subject to the 180-day limitation or depending on the main purchase application) is negated by the other terms and provisions thereof and by the true nature of the applications for temporary lease authority upon which those two Commission members acted. As appears therein the parties thereto only sought and those two commissioners only purported to grant temporary lease privileges pending the final consideration of the main purchase application. As the authority to grant such temporary lease authority for that purpose and under such conditions existed for only one hundred and eighty days which long since expired the attempted denomination of the subsequent purported orders granting temporary lease authority beyond one hundred and eighty days as if arising under and being based upon Section 5 of the statute was not consistent with but was in direct violation of the statute.

The plaintiffs in this action do not assail the validity of such present temporary lease authority which by its own terms expires October 17, 1943, which is the same date as the effectiveness of the dismissal order as to the main purchase application. There could be no new application for temporary lease authority under Section 210 (b) of the statute regardless of whether or not the main purchase application should be pending for the reason that the maximum authorized period of one hundred and eighty days has expired. Therefore, should this Court deny the application for temporary stay or interlocutory injunction, no legal rights of the plaintiffs in this action under Section 210 (b) would be impaired.

Should the plaintiffs herein, on the other hand, wish now or at any time in the future to submit to the Commission a bona fide application under Section 5 of the statute for authority to enter into a genuine nontemporary lease dissociated from and having no relation to any application for approval of a purchase transaction nothing in the statute requires that such purchase application shall be pending as a condition precedent to the filing of such bona fide lease application or the granting of it now or at any time by the Commission in the future.

Wherefore, it is respectfully prayed that the Court shall endorse this intervention as having been granted, that it shall determine and adjudge that no legal rights of the plaintiffs in and concerning the matter of the lease are involved or threatened to be involved by the Commission's dismissal of the purchase application, that no grounds or ground for temporary stay or interlocutory injunction therefore exists, and that the applications for such temporary stay or interlocutory injunction be denied. It is further prayed that on final hearing this Court will determine and adjudge that the Commission's dismissal of the main purchase application because of improper parties was and is in all respects in accordance with law and that the petition to this Court be dismissed.

Respectfully submitted.

HAROLD G. HERNLY,
Harold G. Hernly,
Transportation Building, Washington, D. C.
CHARLES E. COTTERILL,
CHARLES E. COTTERILL,
70 East 45th Street, New York, N. Y.
Attorneys for Intervenor.

Intervention allowed September 20, 1943.

MORRIS A. SOPER,
U. S. Cir. Judge.
WILLIAM C. COLEMAN,
U. S. Dist. Judge.
W. CALVIN CHESNUT,
U. S. Dist. Judge.

65-A

Offer in evidence

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-F-1936

REFINERS TRANSPORT & TERMINAL CORPORATION—PURCHASE—
MARSHALL TRANSPORT CO., INC.

Application of Refiners Transport & Terminal Corporation, Detroit, Mich., for authority under Section 5, Interstate Commerce Act, as amended, to purchase the motor-vehicle rights of Marshall Transport Co., Inc., Glen Burnie, Md.

65-B

TESTIMONY OF EDWARD S. TURNER

Q. Who are the directors of Refiners Transport & Terminal Corporation?

A. E. S. Turner, C. F. Lathrop, F. L. Crawford, and B. C. Graves.

Q. Will you state the occupations of Mr. Crawford?

A. Mr. Crawford is United States Congressman from the 9th District of Michigan.

Q. In so far as you know, do you know whether or not he is interested or takes any active part in the management of any other transportation company?

A. To the best of my knowledge, he doesn't.

Q. In what business was he engaged before he became a Congressman?

A. Banking and in the sugar manufacturing business.

65-C The WITNESS. I don't believe so.

By Mr. COTTERILL:

Q. Now, at the time of the issuance of the original capital stock of Refiners Transport & Terminal Corporation, was any of the stock issued originally to the Union Tank Car concern, or was it originally issued to some one or other persons and later purchased by Union Tank Car Company?

A. I don't know just the details of how that was handled, Mr. Cotterill.

Q. Let's skip the details and get the substance of it. I believe you received some of this stock yourself, did you not, Mr. Turner?

A. That is right. I am fairly positive the stock was issued directly to the Union Tank Car Company.

Q. Yes, and its funds went into the treasury in purchase of that stock?

A. That is right.

65-D Q. You were president at the time, I assume?

A. Yes.

Q. Then, will you not agree that the corporation was organized by the Union Tank Car Company, it was brought into existence by it, planned and conceived and accomplished by it?

Mr. WINTER. I object to that question. The record already shows that this corporation was organized by Mr. Turner and his associates out of the Overland Transportation Company and the Petroleum Transit Company by a reorganization of those corporations.

Mr. COTTERILL. Very well, sir.

By Mr. COTTERILL:

Q. At the time of that so-called reorganization, were you and your associates in any sort of trading relation with the Union Tank Car people?

A. Yes.

Q. Yes. In other words, wasn't the reorganization as characterized a step and an incident of the setting up of a corporation by the Union Tank Car people for the purpose of acquiring your business and that of several other concerns? That was the purpose, wasn't it? Nothing wrong about it, I don't say.

A. Yes, that was the arrangement.

Q. Yes.

A. Putting them all in one corporation.

Q. Yes, certainly.

65-E Q. Yes. Just a word about the negotiations with other companies. Will you kindly advise the Interstate Commerce Commission, as the President of Refiners Transport and Terminal Corporation, whether or not the two acquisitions covered by the present case and the one in Boston constitute the whole of your program of acquisitions in the East at any time in the reasonably near future?

Mr. WINTER. I object to that question for the same reason that he has already testified that there have been negotiations, that no negotiations have developed to a point of a contract, and it is known to everyone present that if they do develop and anything else comes up, it will be presented to the Interstate Commerce Commission at the proper time and in the proper manner. I submit that each one must stand upon itself.

65-F Q. Just a word about the negotiations with other companies. Will you kindly advise the Commission, as President of the Refiners Transport & Terminal Company, whether or not the two acquisitions covered by the present case and the one in Boston, constitute the whole of your program of acquisitions in the East at any time in the reasonably near future?

The WITNESS. They do not.

TESTIMONY OF B. C. GRAVES

(Discussion off the record.)

By Mr. WRIGHT:

65-Q Q. Is it or is it not a fact that there has been during the summer and spring of this year an overall shortage of

transportation facilities along the Eastern Seaboard for petroleum products?

A. I would say there was a shortage of tanker facilities, tank ship facilities, and that there was no shortage of railroad facilities as such, and there was a surplus of tank truck capacity.

I don't speak as an authority on that, but that is my opinion of the situation that exists here on the Eastern Seaboard by reason of the disturbance of the ocean-bound traffic.

Q. Can you tell us why the Union Tank Car Company decided to enter the tank-truck transportation field when they acquired the 86 percent stock interest in the applicant here?

A. Well, I don't know exactly. The whole thought behind it, it looked like a growing business, and a business in which
65-H it might be profitable for us to invest our money, the same way as I think that you and I might select an investment for our own account.

Q. Your tank car business is not, is it, primarily an investment business?

A. No. We have to invest our cash.

Q. And, as I understood your direct testimony, you are taking a position as a director of the Refiners Transport and Terminal Corporation, the applicant in this case, which is contrary to an established policy of your company, is it not?

A. No, sir.

Q. I had perhaps misunderstood you. Didn't you say on direct examination that your company had a policy of discouraging its officers from holding offices in any other enterprise?

A. Unless they were interested in this other enterprise.

Q. This enterprise, the applicant here, is that the only other one in which the Union Tank Car Company is interested?

A. Yes, sir; financially.

Q. And you say the only reason for entering that field was simply to make a good investment, is that correct?

A. Oh, there may have been other reasons behind it. It was in an interesting field, but it was purely an investment. We would never have gone into it if we hadn't thought it was going to be a profitable operation to us.

Q. Now since you have gone into it, has your company
65-I in any way attempted to relate the operations of the applicant here to the operation of your tank-car business?

A. Positively no.

Q. The applicant, then, performs no functions which you use as a supplementary service for your tank-car business; is that correct?

A. That is correct.

Q. And you have served as a member of the Board of Directors of the applicant ever since its organization?

A. Yes, sir.

Q. And you were consulted, were you, before the application was made here?

A. Personally?

Q. Yes.

A. No, sir. As a director, I had heard of it at a Board Meeting where the President reported his activities, but as an individual I would say no.

Q. Well, was any action taken by the Union Tank Car Company with reference to the filing of this application?

A. Not to my knowledge.

Q. The matter was not submitted by you to the Board of Directors of the Union Tank Car Company?

A. Not at all.

Q. Are the funds which are to be used to make this acquisition to be furnished by the Union Tank Car Company?

65-J A. I don't know.

Q. No decision has been made with respect to that?

A. That is correct.

Q. It is quite possible, however, is it not, that in the event the application is granted, the funds with which this purchase will be made will be supplied by Union Tank Car Company?

A. I wouldn't think that it can be as closely identified to that particular purchase, if this company increased their common and capital stock and offered it to their stockholders, the minority interests as well as ourselves. We may purchase our share of the offering, and that could be used for any purpose this corporation wishes to use it for.

Q. You would do that if the course which has been followed by you and the applicant with reference to past acquisitions is followed in this case; isn't that correct?

Mr. WINTER. I think that question is misleading with reference to past acquisitions. I don't believe that there have been any past acquisitions by this company in interstate commerce other than the reorganization of the original companies; the Overland Transportation Company, Petroleum Haulers and Petroleum Transit, as to which the record is clear.

By Mr. WRIGHT:

Q. Perhaps I am mistaken, but isn't it a fact that your original interest, the interest of Union Tank Car Company in the applicant company was substantially less than it is now?

A. Yes, that is correct.

65-K Mr. WINTER. Would you read that question, please.
(The reporter read the question.)

The WITNESS. Our percentage interest, you mean?

By Mr. WRIGHT:

Q. Yes, your percentage stock interest?

A. Yes.

Mr. WINTER. All right.

By Mr. WRIGHT:

Q. And it is also a fact, is it not, that your percentage stock interest was increased to its present level as a result of your purchase of additional shares to supply money to the applicant to acquire additional facilities?

Mr. WINTER. There is nothing in this record that so indicates.

Mr. WRIGHT. I am asking him whether it is a fact.

The WITNESS. I would say that our stock interest has increased percentagewise by reason of this corporation using that media to increase their available cash. For what purpose it was raised at the time I can't say.

By Mr. WRIGHT:

Q. Do you know what was done with the increase in cash that result?

A. I would know as a director that they probably bought new equipment, wherever it was available. I couldn't really earmark that money for any particular purpose here now. No, sir; I can't. My memory doesn't go that far.

65-L Examiner RALEY. Will you read the question, please.

(The reporter read the question as follows:

"At the time that Union Tank Car Company authorized the purchase, was there any discussion between Union Tank Car Company officers as to what the purpose of the purchase was?")

Examiner RALEY. That is the purchase of additional stock, Mr. Graves, I believe.

The WITNESS. I will say yes.

By Mr. WRIGHT:

Q. Was any formal action taken by Union Tank Car Company's Board with respect to the purchase?

A. That I don't recall.

Q. Is there any record of the Union Tank Car Company which would show what the purpose of the purchase was?

Mr. WINTER. I object, the same objection. This is not an inquisitory or investigational proceeding. If the Department of

Justice wants to go further, it has means of doing so. It is not proper here.

Examiner RALEY. I am not clear as to what the additional purchase of the stock that is being inquired about amounted to. What was the original amount of the stock purchased by Union Tank Car Company? Do you recall the percentage, Mr. Graves?

Mr. WINTER. I submit that that is already in the record in the decision of the Commission which has been referred to here at length.

65-M (The reporter read the question as follows:

"Is there any record of the Union Tank Car Company which would show what the purpose of the purchase was?")

Examiner RALEY. I will overrule the objection.

The WITNESS. I wouldn't think the Union Tank Car Company record would show the specific purpose for which this money was to be used, but I would think that the Refiners Transport & Terminal records might show it.

By Mr. WRIGHT:

Q. As an officer of the Union Tank Car Company, did you know at the time this last purchase of stock was made by the Union Tank Car Company what the proceeds of the purchase were to be used for?

A. In a general way I think I did, yes, sir; because I sat on the Board of the Refiners Transport & Terminal Company when the needs of their business were being discussed.

65-N By Mr. HERNLY:

Q. In the collateral application with respect to the issuance of stock for the financing of this acquisition, Mr. Graves, which is docketed as MC-F-1974, a statement appears therein that the 500,000 shares of stock proposed to be issued would be distributed pro rata among the present stockholders or shareholders, which would imply that Union Tank Car Company is going to buy 82.6 percent of this proposed stock.

There is also a statement in the same part of the application that in the event that the minority shareholders do not exercise their right to buy their prorata share, that the applicant believes that the Union Tank Car Company will buy their portion; and the assumption is that if the minority stockholders will not buy or exercise their opinion, that they will buy all of it; is that correct, sir?

A. I don't know. I didn't make that application.

Q. Is that the attitude of Union Tank Car Company, as represented by the applicant?

A. I don't know.

Q. You are an officer of Union Tank Car Company, are you not?

A. But I haven't made any such deal.

Examiner RALEY. Any further questions on cross examination?

Mr. COTTERILL. Yes, sir.

By Mr. COTTERILL:

Q. Didn't the directorate take any action, Mr. Graves, that committed itself to that?

A. Not to my knowledge as yet. I don't think it has come formally before us.

Q. Have you any thought as to the reason why the Refiners Transport & Terminal Corporation should make that representation to the Commission?

A. I don't know a thing about it. That is up to the Refiners Transport & Terminal Corporation.

Mr. WINTER. I submit Mr. Hernly's question and the subsequent discussion is as to matters which are not at issue in this proceeding. That is another proceeding.

Examiner RALEY. Mr. Winter, I think the question is pertinent, but the witness has testified he knows nothing about it.

Mr. COTTERILL. That is right.

65-P Examiner RALEY. Any further questions on cross examination?

Mr. COTTERILL. I have nothing further.

Examiner RALEY. Any questions on redirect examination?

Mr. WINTER. Just one second, please.

Examiner RALEY. Let's have a five-minute recess.

(A short recess was taken.)

Examiner RALEY. Mr. Winter, I believe you had a few questions to ask Mr. Graves.

Redirect examination by Mr. WINTER:

Q. Mr. Graves, you commented a minute ago that a statement made by Mr. Cotterill was a misstatement. I believe it bore upon upon the organization of Refiners Transport & Terminal Corporation. I think that Mr. Cotterill understood you to say that, probably because he didn't recall the record correctly, Union Tank Car Company organized Refiners Transport & Terminal Corporation, or some such remark. Will you give us the true facts on that that you had in mind there?

A. The true facts, as far as I remember it were that this stock was offered to us by Refiners Transport & Terminal Corporation and we offered to buy it. "

Q. Will you state whether or not the Union Tank Car Company organized or became interested in Refiners Transport & Terminal Corporation as an adjunct to its tank car operations?

A. I would say that we never had anything like that in mind, to my knowledge. Maybe somebody else did.

Q. It was—

A. We never intended to have this company operated as an adjunct to the Union Tank Car Company, or the Union Tank Car Company operated as an adjunct to it.

We retained the same management, or the same management was retained, and the management today are the same men that operated it before, and they are the minority stockholders, plus other individuals.

Q. You said a moment ago that if there was any such intent, it was not to your knowledge. Do you mean to say that if it had been the official intent of the company you would have known about it?

A. I would hope so, yes, sir.

Q. You meant by your remark that if some individual had such a secret design, it was not known to you?

A. Yes.

Q. You said it was the policy of the Union Tank Car Company that its officers and directors would not occupy positions in other corporations unless it was interested in them. You meant who had money in them, is that what you meant?

A. Financially interested; yes, sir. That may be the cause of the waiver or the reason for my being permitted to sit on this Board.

Mr. WINTER: There is nothing more that we have from 65-R this witness.

Recross examination by Mr. COTTEILL:

Q. Mr. Graves, it appears, I think, that Mr. Turner before becoming an associate with you gentlemen was engaged in the petroleum haulage by tank truck, and he and his associates had varying degrees of interest in three tank truck companies, the names of which have been put into the record.

Are you advising the Commission now that the bringing together of those three tank truck companies into Refiners Transport & Terminal Corporation was an entirely independent act on the part of Mr. Turner and his own associates, having no relation to any negotiations with you gentlemen whatsoever?

A. I can't testify that that is the case.

Q. That it is or is not the case?

A. That it is or is not the case.

Q. I do not mean to challenge, in the least degree, your veracity in this comment, but you have made the apparently unqualified assertion that the Union Tank Car Company didn't bring the Refiners Transport & Terminal Corporation into existence; it was not instrumental in bringing it about. If your recollection is so clear on that, why can't you be equally clear in your recollection such a short time ago on my question?

A. My recollection was clear because—not as to the details, but as to the motive, and I thought that you indicated that we had created a child here that was to serve the Union Tank 65-S Car Company, to serve a purpose in the conduct of the Union Tank Car Company's business, and that was why I took exception to your remark.

Q. You put the emphasis on the motive rather than the modus operandi?

A. That is correct.

Q. Then, let us confine ourselves to the latter, which was the part I was really concerned with. Is it not a fact that the creation of the Refiners Transport & Terminal Corporation was the consequence of a decision made by the Union Tank Car Company that such a corporation should be created?

A. I don't think that is a proper statement of fact.

Q. How would you phrase it?

A. I would phrase it that this stock was brought into a condition where we could acquire it in a simple form—

Q. Yes.

A. By the mind of Mr. Turner and his associates and counsel, or whatever it was.

Q. Well, we will have to break that down, then, a little bit, I guess. At least, before you acquired the stock of Refiners Transport & Terminal Corporation, had there been any negotiations between officers of the Union Tank Car Company and Mr. Turner and his associates?

A. Before?

Q. Yes.

65-T A. Yes, I would say that there were conversations.

Q. And they were directed to the purpose of bringing about the ultimate ownership by Union Tank Car Company of a controlling interest in a new corporation to be created?

A. I think that is probably true.

Q. And that new corporation so to be created would embrace the three former operations of Mr. Turner and his associates?

A. I would say that is correct, not to our discussion particularly as to how to do it.

Q. You gentlemen either as a Board or armed with authority as an executive committee had concluded that in some suitable

manner you were going to become involved in the motor carrier haulage of petroleum products, hadn't you?

A. That is right.

Q. That is correct?

A. Yes.

Q. And the step which was initially taken is the matter which we have just agreed upon?

A. I think so, yes.

65-U Examiner RALEY. And the subsidiaries operate as a separate entity.

Mr. WINTER. The subsidiaries operate as a separate entity, but the relationship is very close because it is wholly owned.

Examiner RALEY. Of course, that is always the situation where there is a wholly owned subsidiary, but nevertheless the accounts, I think, should be segregated. I would suggest that the giving-effect balance sheet leave out the subsidiaries.

Mr. WINTER. I think I asked Mr. Turner these questions in Boston and he was unable to answer them, if I am not mistaken, so in furnishing the income statement—no, I guess the income statement has already been furnished for vendee as of August 31.

We will have to have an exhibit explaining what makes up the item "Other Income" and the item "Other Expenses."

Mr. WINTER. We will do that.

66 In the District Court of the United States for the District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT COMPANY, A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Before SOFER, Circuit Judge, and COLEMAN and CHESNUT, District Judges

Opinion

Filed October 16, 1943

CHESNUT, D. J.

The plaintiffs in this action seek a temporary restraining order and a temporary injunction to stay the enforcement of, and to

set aside an order entered by, the Interstate Commerce Commission on September 2, 1943, which rejected and dismissed an application of the plaintiffs for authority to consummate a sale of certain motor-vehicle common carrier operating rights and certain motor vehicles, equipment, and facilities to Refiners Transport and Terminal Corporation. The Commission dismissed the application because it was of opinion that it had no jurisdiction to entertain it since the Union Tank Car Company, a New Jersey corporation, the owner of 82.6 percent of the outstanding stock of Refiners, was not a party thereto. The bill of complaint also prayed the issuance of a mandatory injunction requiring the Commission to take jurisdiction of the application and to consider it upon its merits. This court was organized to consider the case under
 67 the appropriate statutory provisions. See s. 17 (9) and s. 205 (g) of the Interstate Commerce Act, 49 U. S. C. A., ss. 17 (9), 305 (g); and the provisions for judicial review codified in 28 U. S. C. A., ss. 41, 43-48, 45 (a), and 47 (a); See also *Rochester Telephone Corp. v. United States*, 307 U. S. 125. The Interstate Commerce Commission and certain protesting motor-vehicle carriers have intervened.

The facts, set out at length in the report of the Commission filed April 5, 1943, are not in dispute. Marshall Transport Company, Inc., is incorporated and has its principal place of business in Maryland. The Transport Company holds a certificate of public convenience and necessity as successor in interest to Marshall under the "grandfather" clause, ss. 206, 207, Interstate Commerce Act, 49 U. S. C. A., ss. 306, 307, so that the corporation is authorized to conduct operations in interstate commerce as a motor-vehicle common carrier of petroleum products in bulk in tank trucks over irregular routes in Maryland, Delaware, Pennsylvania, Virginia, and Washington, D. C. All of Transport's outstanding capital stock except two qualifying shares is owned by plaintiff, Warren C. Marshall, who is also president of Transport. Transport has title to certain physical property consisting of shop and garage equipment, office furniture and equipment, and material and supplies. However, Marshall personally owns the automotive equipment employed by Transport, which is used by the latter under a leasing arrangement, and also certain real estate at Glen Burnie, Maryland, employed as a terminal by Transport. It was these operating rights and this property, whether owned by Transport
 or Marshall, which Refiners sought authority to purchase
 68 in the instant application. Refiners also has pending before the Commission several other applications for the purchase of petroleum motor carriers operating in the eastern states.

Refiners Transport and Terminal Corporation is incorporated and has an office in Wilmington, Delaware, and operating offices in Detroit, Michigan. It holds a certificate of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier by motor-vehicle of petroleum and petroleum products in territory in Michigan, Ohio, Indiana, Illinois, Wisconsin, Missouri, Kentucky, Pennsylvania, and West Virginia. The organization of Refiners and of Union Tank Car Company are described in the following passage from the report of the Commission:

"REFINERS' ORGANIZATION

"Refiners is the result of a consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3. (These rights were acquired from its predecessor, Petroleum Transit Corporation, pursuant to authority granted in Nos. MC-FC 14544 and MC-FC 14544-A on February 24, 1941.) It controls through ownership of capital stock, Petroleum Haulers, Inc.; an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value \$10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total outstanding) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier. (Motor Express, Inc.) It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment, to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latter's tariff. (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout

the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 percent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents."

For complete details of the corporate organization and history of Refiners see the report on this corporation's application to the Commission for authority to issue additional stock found in 36 M. C. C. 789.

On July 8, 1942, an agreement of sale was executed between Transport and Marshall, as vendors, and Refiners, as purchaser, whereby Refiners purchased for the sum of \$142,000 the operating rights and properties of Transport and certain equipment and terminal facilities of Marshall in Pennsylvania used by Transport in its operations. Shortly thereafter Transport took title to 10 tractors and 10 trailers with tires included in the purchase for \$36,500, the remainder of the purchase price to be subject to certain adjustment and to be paid upon the approval and consummation of the sale. On July 18, 1942, Refiners purchased other equipment of Marshall for the sum of \$6,000.

Application to the Commission for authority to consummate the purchase was duly made by the parties to the contract and Refiners has since operated the property, first under temporary authority granted by the Commission under Sec. 210 (b) of the Act, 49 U. S. C. A., s. 310 (b), and subsequently under a temporary lease expiring October 17, 1943, executed with the authority of the Commission purporting to be based upon the provisions of s. 5 (2) (a) of the Act, 49 U. S. C. A. s. 5 (2) (a). The application came up for hearing before Division 4 of the Commission upon a favorable report of an examiner of the Commission and exceptions thereto filed by certain protesting carriers and by the Anti-Trust Division of the Department of Justice which had appeared at the examiner's hearing. Authority to consummate the purchase was granted by the Division in accordance with its report filed on April 5, 1943, one Commissioner dissenting. Subsequently the matter came up for rehearing before

the whole Commission which held in a report filed August 3, 1943, two Commissioners dissenting, that the application could not be lawfully approved because Union Tank Car Company, the owner of 82.6 percent of Refiners' outstanding stock, was not joined as an applicant therein. The Commission stated that it would dismiss the application but would defer its order for twenty days in order that Union might have an opportunity to file an application. Union did not avail itself of this opportunity and accordingly the Commission on September 2, 1943, issued its order, effective October 17, 1943, dismissing the application. The present case was instituted to set aside this order and require the Commission to consider the application on its merits.

The case turns upon the construction to be given to s. 5 (2) (a) (i) of the Act, which is as follows:

71 "s. 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)-(i), for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *"

The pertinent clauses in this section of the statute are those which make it "lawful with the approval and authorization of the Commission * * * for any carrier * * * to purchase * * * the properties * * * of another"; or "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that whenever a transaction is proposed under s. 5 (2) (a) the carrier or person seeking authority therefor shall present an application to the Commission which shall afford a reasonable opportunity for interested parties to be heard, and if the Commission finds that the transaction is consistent with the public interest, it shall enter an order approving the transaction upon terms and conditions which it shall find to be just and reasonable.

Other references in the statute to the control of one person or corporation by another, which should be considered in determin-

ing the meaning of the word "control" in s. 5 (2) (a) are found in s. 1 (3) (b) and s. 5 (4) as follows:

"s. 1. (3) (b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons, such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

"s. 5. (4) It shall be unlawful for any person, except as provided in paragraph (2) to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however, such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

The essential controversy is whether the statute is satisfied by securing the approval and authority of the Commission to consummate the sale upon the joint application of Transport and Refiners, or whether Union, as the owner of the majority of Refiners' stock, must also be joined in the application. The significance of the decision resides in the requirements of s. 5 (3) of the Act which subjects to the jurisdiction of the Commission any person, other than a carrier, who acquires control of a carrier with the approval of the Commission. Section 5 (3) is as follows:

"5. (3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control; Section 20 (1) to 10, inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section

73 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a. of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest."

It is important to appreciate the precise, and limited, point that we are called upon to decide. Division 4 of the Commission after hearing the evidence and argument by counsel for the applicants and protestants, considered both the merits of the case and the applicable law. It found the application was made by proper parties under the statute, that the transaction was reasonable and would be in the public interest and it thereupon ordered that the application be approved, subject to certain conditions not here material. Thereafter an application by the protestants the full Commission reconsidered the case, did not pass upon the merits, but dismissed the application on the ground that the majority stockholder of Refiners, the purchasing carrier, was not a party to the application. The final conclusion of the Commission was thus expressed:

"We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party in interest, the controlling corporation, Union. The application should be dismissed. Entry of an order dismissing the application will be deferred for a period of 20 days from the date of service of this report in order to afford an opportunity for Union to file an appropriate application. In view of this conclusion further discussion of other contentions now of record is unnecessary."

74 The conclusion thus reached was not based upon the nature or particularities of Union in the field of transportation or otherwise, but solely on the ground that the Union was a corporation which owned a majority of the capital stock of Refiners, the purchasing motor carrier. The rationale of the Commission's decision is equally applicable to any person or corporation, not a carrier, which owns or controls a majority of the stock of a carrier corporation. And the necessary result therefore is that the Commission lacks authority—power or jurisdiction—to grant any application by one motor carrier for the purchase of the property and operating rights of another motor carrier, unless the majority stockholder of the purchasing

carrier formally joins in the application. In reaching this conclusion the Commission departed from its long consistent prior practice to the contrary. As was said by Commissioner Porter in his dissenting opinion:

"Thus for more than seven years we have decided hundreds of applications like the instant one without the majority stockholder of purchaser being a party applicant; but suddenly the majority penalizes this particular purchaser for following the procedure which we ourselves long since established."

We think the conclusion reached by the Commission is not in accord with the intention of the statute to be gathered not only from what seems to us its plain wording, but also from its historical development.

The application in the instant case falls precisely within the permissive phrase of section 5 (2) (a) that it shall be lawful with approval and authorization of the Commission "for any carrier * * * to purchase * * * the properties, or any part thereof, of another; * * *". The construction of the
75 statute by the Commission excludes the force and effect of this express authority to the Commission on the ground that it is superseded in the instant case by a subsequent permissive authority given to the Commission "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." That is to say, the construction of section 5 (2) (a) by the Commission takes away the authority of the Commission to even consider any application by one motor carrier for the property of another whenever the purchasing carrier has a majority stockholder, unless the latter is a party applicant.

The grammatical structure and wording of section 5 (2) (a) very clearly shows that authority was given to the Commission to consider and act upon applications made by (a) a carrier or carriers and (b) a noncarrier in different types of cases and that the Commission was given such authority to act in any one of the several enumerated situations. Thus, if an applicant or applicants are carriers the Commission is given authority to (1) permit them to consolidate or merge their properties or franchises; (2) to purchase, lease, or contract to operate the properties of another carrier; or (3) to acquire control of another carrier through stock ownership or otherwise. And if the applicant is not a carrier, it may, with the permission of the Commission, acquire control of two or more carriers through stock ownership or otherwise; and if the applicant has control of only one carrier, it may likewise acquire control of another carrier

through stock ownership or otherwise. These several situations in which the Commission is given authority to act are clearly made separate and independent in the statute; but the construction adopted by the Commission has the effect of making the permitted situations in which a carrier or carriers may apply to the Commission alone, dependent upon the last enumerated situation in which a noncarrier, having stock control or otherwise, one carrier, seeks to acquire control of another. The result can only be reached on the theory that the last named permissive situation in which the Commission has authority to act eliminates or supersedes the former situation in which the Commission is expressly given the authority to act. This is not the natural construction of the wording of the section; and it is obvious that it is a construction that is not readily apparent, as the consistent practice of the Commission in similar cases for many years has been to the contrary. We think the proper meaning is that the Commission has authority to act in any one of the several permissive situations irrespective of the others. It is suggested that s. 5 (2) (a), while permissive in form is in substance made restrictive by the wording of s. 5 (4), but this view is untenable as s. 5 (4), making certain transactions unlawful, expressly excepts those authorized by s. 5 (2) (a).

The view of the Commission that the "noncarrier control clause" is restrictive of its authority to act on the "carrier purchase" clause of s. 5 (2) (a) is clearly contrary to the intention of the statute as seen in its historical development.

As is well known, the original authority of the Interstate Commerce Commission over carriers was contained in the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380. The public policy which was at least implicit in this statute (and was expressed in the Sherman Anti-Trust Act of 1890 in a broader field) was that competition was desirable, and that carriers should be independently operated for the public benefit. Accordingly, although the original Act of 1887 was frequently amended in detail in subsequent years, the Commission was not itself given authority to permit consolidations, mergers or other combinations of rail carriers, until the passage of the Transportation Act of Feb. 28, 1920, c. 91, s. 407, 41 Stat. 480. (Roberts, Fed. Liability of Carriers (1929) Vol. I, ss. 92, 93.) In the meantime, however, general economic experience, emphasized by the lessons learned from the government operation of railroads during World War I, showed that there could well be in particular situations public benefit in economies and facilities of operation by mergers or combinations of rail carriers. Thus there was written into the Transportation Act of 1920, s. 5 (2), authority to the Commission to permit one carrier to acquire con-

trol of another carrier or carriers "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system," if found to be in the public interest. And indeed by s. 5 (4), the Commission was directed as soon as practicable to prepare and adopt a plan for consolidation of the railway properties of the Continental United States into a limited number of systems. This proved a very difficult problem for the Commission and nothing has successfully been done thereunder up to the passage of The Emergency Railroad Transportation Act of June 16, 1933, c. 91, 48 Stat. 217, 220.

78 But for several years prior thereto Congress had given consideration to the subject of the public policy involved in the control of two or more carriers through the medium of a "holding company." A prototype of this latter corporate device as affecting rail carriers had years before been considered by the Supreme Court in the Northern Securities Case, 193 U. S. 197, and had been condemned as in violation of the Anti-Trust Act. The study by Congress of the effect of the holding company in this relation resulted in the re-writing of section 5 of the Interstate Commerce Act by the Emergency RR Transportation Act, and then there appeared for the first time, among the permissive clauses giving authority to the Commission to act, the categories with respect to persons or corporations not carriers acquiring control of two or more carriers through stock ownership. (See Sharfman, *The I. C. C.* Vol. III A, pp. 495-501 (1935).) As then phrased the permissive clause related only to control through ownership of stock. When Congress brought motor carriers under the control of the Commission (Aug. 9, 1935, c. 498, 49 Stat. 543) it gave in very similar language in s. 213 authority to the Commission to permit combinations of those carriers. Finally, by the Transportation Act of 1940 (Sept. 18, 1940, c. 722, 54 Stat. 905) water carriers were also subjected to the authority of the Commission; and the whole Interstate Commerce Act was re-written into three parts, Part I, dealing with rail carriers, Part 2, with motor carriers, and Part 3, with water carriers. Section 5 of the Act was re-written to comprehensively include all three types of carriers (and an express company) in one provision regarding unifications, merges and acquisition of control. (See 49 USCA, s. 5 (13).) At the same time there was also added in s. 5 (2) (a) the words "or otherwise" in the clause with regard to a noncarrier acquiring stock control over two or more carriers.

79 From this history of the legislation we see that there has been a gradual extension of the authority of the Commission to permit mergers and consolidations of carriers subject to its

regulation. Prior to 1920 the Commission had no such authority, and the Supreme Court had held in the Northern Securities Case that indirect unified control of two otherwise competitive rail carriers through the means of a separate holding company was prohibited by the Anti-Trust Act. To meet this condition, in part at least, and thus obtain the public benefit of unified control in particular situations, Congress provided in the Transportation Act of 1920, that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by a lease, or purchase of stock or otherwise not involving actual consolidation; and by s. 5 (8) the carriers affected by the order of the Commission were to be relieved from the operation of the "antitrust laws." And by s. 5 (6) the Commission was also authorized, upon special conditions, to approve the actual consolidation of rail carriers. So far the Commission had no authority to permit the unified control of two separate carriers by the holding company device, which was still subject to the anti-trust laws. But in 1933 Congress further broadened the authority of the Commission by permitting approval of this condition when found in the public interest. It thus appears that the noncarrier control clause of the 1933 statute was intended to apply to a holding company control of two or more carriers, which is a quite different condition from the one involved in the instant application.

80 No further change was made in the phraseology of s. 5 (2) (a) until the Transportation Act of 1940 added the phrase "or otherwise" as previously noted. It appears from the Commission's opinion in this case that the chief reliance for the present construction of the Act is placed on the addition of this phrase. Indeed counsel for the United States and the Interstate Commerce Commission at the argument in this Court conceded that their position was untenable save for the change said to have been effected by the addition of this phrase "or otherwise." But we think it clear that the addition of this phrase had no such effect. It expanded and did not restrict the scope of action and authority of the Commission. That this was the intended effect is expressly stated in the only legislative history of the change which has been called to our attention. In House Conference Report, No. 2832, Aug. 7, 1940, p. 68, it was said:

"1. Paragraph (2) is changed by adding the words 'or otherwise' in several places, so that acquisition of control by methods other than true ownership of stock is *authorized with Commission approval.*" [Italics supplied.]

In the Congressional Record for the Senate on September 9, 1940, pp. 17848 to 17851, there is contained a statement by Senator Wheeler giving some explanation of certain provisions of the

Transportation Act which, in discussing the new section 5 contains no intimation that there was any intention to effect the change in the statute now read into it by the Commission. What Senator Wheeler there said was: "The principal change in existing law on consolidations is the repeal of the provision requiring the Commission to prepare and adopt a general consolidation plan. Section 213 of the Motor Carrier Act, which related to unifications of motor carriers, is repealed, and the law governing all mergers or consolidations of carriers covered by the Act is amended by s. 5 of the Interstate Commerce Act."

The basic misconception of the statute found in the Commission's present construction is in treating the non-carrier control clause of s. 5 (2) (a) as restrictive or prohibitive when the history of the enactment shows clearly that it was not intended to be restrictive but permissive. In this respect the effect of the Commission's present position is to reverse the consistent progressive congressional policy in broadening the authority of the Commission to deal with various types of cases involving control of two or more carriers. This misconception seems to be due to a confusion between the permissive clause of s. 5 (2) (a) and the prohibitive clauses, of ss. 5 (4), (5), and (6). Until 1933 noncarrier control of two or more carriers was prohibited, not by the Interstate Commerce Act, but by the Anti-Trust Act. (See the discussion in Sharfman, *supra*, Vol. III. A, p. 435 et seq.) When in 1933 Congress extended the authority of the Commission to permit non-carrier control of two or more carriers through stock ownership (that is a holding company) it also for the first time in the Interstate Commerce Act was at pains to expressly prohibit unified control of two or more carriers in any other way than those permitted in s. 5 (2) (a). The effect of these sections taken together was that the Commission had authority to permit unified control by a noncarrier holding company, but not by other types of noncarrier control. The 1940 Act by adding the phrase "or otherwise" to the clause further extended the authority of the Commission in this respect.

The construction of the statute now adopted by the Commission is not necessary to the public interest in the regulation of carriers. When a noncarrier acquires control of two separate carriers (without Commission approval) there exists the possibility of disadvantage to the public interest in that one carrier may be managed in the interest of another carrier (see s. 5 (6)). To prevent this it is made unlawful for the noncarrier to acquire such control without the Commission's approval, which is to be obtained only upon an application to the Commission by the noncarrier which may then be subjected to such conditions as may be thought necessary

by the Commission in the public interest to the extent authorized by s. 5 (3). Without discussing such permissible conditions in detail it is sufficient to say that their general purpose is to preserve the integrity and efficiency of the separate carriers to the extent necessary for the public interest. Without such Commission control over the noncarrier, the Commission would have no authority to restrain its possible prejudicial activities. But when the application is made directly by one or more carriers to the Commission, the latter has full and complete authority over them by the statute to the extent of the public interests involved. In the instant case where the carrier is directly applying to the Commission to purchase the property and franchises of another motor carrier which will then cease to function as a carrier, it seems quite impossible to infer that there could be public disadvantage by reason of lack of authority of the Commission to fully deal with the matter on the merits.

In dismissing the application in this case the Commission referred to Union, the majority stockholder of Refiners, as the "real party in interest." We understand this to mean no more than that the Commission felt it had no authority to consider the application by reason of its construction of the statute. But it is proper to say that in our opinion the application in this case was in fact made by the real party in interest within the statutory intent. It is a common concept of corporation law that there is a distinct difference between a corporation and its stockholders (Pullman Car Co. v. Mo. Pac. Ry. Co. 115 U. S. 587, 597; Hazel-tine Corp. v. Gen. Elec. Co. 19 F. Supp. 898, 900). On the mere question of the jurisdiction of the Commission under the statute, there is no occasion in this case to go behind the direct action of the corporation itself. Our attention has not been called to any evidence in this record that the application by Refiners was anything other than due corporate action. The fact that its majority stockholder may have also approved it is immaterial. If at the hearing on the merits the Commission finds there are special reasons affecting the public interest growing out of the particular situation of Union in the field of transportation, that is a matter which the Commission can, of course, properly consider on the merits. We have no occasion to consider it here. It is not denied that on the merits the Commission has ample authority to inspect the books and records of Union so far as relevant to the case.

(See 49 U. S. C. A., s. 320 (d).) On the other hand the construction adopted will tend to the public disadvantage in discouraging applications for carrier consolidation which may really be in the public interest.

Some of the discussion in the opinion of the Commission seems to confuse the question of the authority of the Commission with

the merits of the particular application. Thus it is said that Union, as majority stockholder of Refiners, might furnish additional capital for the purchase of properties of other motor carriers and thus through its subsidiary (Refiners) expand indefinitely in the field of motor transportation. But the complete answer to this suggestion is that no purchase proposed directly by Refiners, even though stimulated by its majority stockholder, could be made effective without the approval of the Commission on the merits. (In holding that the Commission has the authority under the statute to consider the application in the instant case, we do not intimate or imply any opinion whatever with regard to whether the Commission should approve the application on the merits. Indeed as appears from the Commission's report and the record of the case, numerous other objections on the merits have been interposed to the approval by the Commission. We have no occasion to consider them. All we hold is that on the proper construction of the statute the Commission has authority to consider the application. At the hearing here inquiry was made from the Bench as to whether counsel for the defendants interpreted the order of the Commission as amounting to a dismissal on the merits or only on the jurisdictional ground. The response of counsel for the Interstate Commerce Commission was that the latter was the only possible interpretation of the Commission's opinion and order, and so it seems to us.

85 The principal argument advanced by counsel for the defendants in support of the Commission's order is that, when Refiners buys the property of Transport, Union, as the majority stockholder of Refiners, will thus acquire control of Transport and therefore the case falls within the noncarrier control clause of 5 (2) (a). It is correctly said that if Union had itself acquired stock control of Transport, the transaction would be directly within the noncarrier control clause; and it is argued that a purchase of the property and franchises of Transport by Refiners is likewise an acquisition of control by Union. Attention is also called to the broad definition of control contained in the statute and to the legislative intention that it is to be interpreted in the light of the decision of the Supreme Court in *Rochester Telephone Corp v. United States*, 307 U. S. 125 (see CFe. Report, supra, p. 635).

For the reasons heretofore indicated we think this argument, so far as it is sound, goes to the merits of the particular application rather than to the authority of the Commission to consider it. We are in accord with the view that the word "control" should have the broad construction indicated, but as we find the non-carrier control clause is not restrictive of the carrier purchase

clause, and is therefore not applicable to the instant situation, it is unnecessary to the decision here to determine the full extent of the word "control." But it is not inappropriate in this connection to point out that the breadth of construction must necessarily be limited by the main purpose of the statute, which was to prevent unfair domination and management of one carrier for the advantage of another. Such a condition can exist only

86 where there are two going carriers. In the instant case if the application of the carriers is granted by the Commission there will result but one carrier, a majority of whose stock will be owned by Union. We do not think it was the intention of the statute to make the noncarrier control clause applicable to such a situation, at least with respect to the authority of the Commission to consider the application. If the particular relationship of Union in the whole situation is deemed material by the Commission, that can be fully considered by it on the merits of the case.

At the hearing of this case it was agreed that the matter should be submitted for final order or decree as well as upon the application for preliminary injunction. We conclude that the complainants are entitled to a final order to the effect that the Commission has authority to hear the application of Refiners and Transport on the merits without the formal joinder of Union in the application.

Counsel may submit the appropriate judgment in due course.

W. CALVIN CHESNUT,
United States District Judge.

WILLIAM C. COLEMAN,
United States District Judge.

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Dissenting opinion.

SOPER, Circuit Judge, dissenting:

It is true, as pointed out in the court's résumé of the relevant history of the statute under consideration, that Congress has recognized the economic desirability or necessity of the merger or combination of carriers in the various fields within the jurisdiction of the Interstate Commerce Commission. Through the years there has been a gradual extension of the Commission's authority to permit carrier mergers and consolidations. Equally clear, however, has been the purpose of Congress to subject these natural monopolies to regulation, and each extension of the Commission's power to permit consolidations has involved also the extension of its power and duty to secure and exercise regulatory control.

It is from this viewpoint that we must answer the question whether Union, a noncarrier which already controls through stock

ownership one motor carrier, to wit, Refiners, may secure control of another carrier, that is, Transport, by causing Refiners to purchase and operate Transport's property and privileges, and may do this without subjecting itself to the Commission's authority. It is conceded that if the transaction were to be consummated through the acquisition by Union of stock control of Transport, Union would be required by the statute to make application to the Commission. But it is said that if Union secures substantially the same extension of its influence in the carrier field through the instrumentality of Refiners, its subsidiary, Union, may lawfully remain free from the Commission's control; or, in other words, that without subjecting itself to the Commission's control Union may extend its operations in the motor-carrier field indefinitely provided only that it does not act directly as the purchaser 88 of the property or the controlling stock interest of another carrier but secures the property or stock control thereof through the medium of its subsidiary.

This conclusion is reached very largely by centering attention upon the terms of Section 5 (2) (a) of the statute which inter alia authorize the Commission to approve, either the purchase by one carrier of the properties of another, or the acquisition by a noncarrier, which has control of a carrier, of another carrier through ownership of its stock or otherwise. Since the application of Refiners to the Commission for the approval of its purchase of Transport satisfies the first alternative, it is said that it is not necessary for Union to comply with the second alternative by joining in the application. It happens in this instance that the same transaction will accomplish both alternatives, for not only will Refiners thereby acquire the property of Transport, but Union will secure control of Transport, if a liberal rather than a strict interpretation is given to the term. It does not seem reasonable to believe that Congress intended to exempt from the Commission's control the dominant actor in such a situation; and this becomes more clear when the provisions of Section 5 (4) are given effect. Therein it is made unlawful for any person to accomplish the control in common interest of two or more carriers in any manner whatsoever except as provided in Section 5 (2), Paragraph (a) thereof requires the approval of the Commission to the transaction; and paragraph (b) thereof requires a person seeking authority to engage in such a transaction to present an application to the Commission and gives the Commission power to approve it; if it finds that it is within the scope of paragraph (a) and will be consistent with the public interest. It seems obvious, therefore, that it will be unlawful for Union to enter into the proposed transaction unless it applies for and

89 receives the Commission's approval; and it becomes the duty of the Commission to refuse to consider the proposed transaction unless Union joins in the application, for otherwise the Commission's approval will countenance the participation of Union in the formation and management of the proposed consolidation contrary to the terms of the statute.

We are told that this construction of the Statute involves the basic misconception that Section 5 (2) (a) is restrictive of the Commission's power when history shows that the section was intended to be permissive. This conclusion also is reached by centering attention upon this subsection without sufficient consideration of the other statutory provisions. The fact is that the Commission's interpretation actually augments its power and authority. If its view is adopted neither the holding company nor the subsidiary may proceed without its approval. Moreover, if, as in this case, the interested person is not a carrier, and if he is authorized to acquire control of a carrier, he must thereafter, to the extent provided by the Commission, be considered a carrier and subject to certain carrier provisions which are enumerated in Section 5 (3) of the statute. Clearly the Commission's interpretation confers upon it a control of all the persons involved which is coextensive with the merger or consolidation that is to be effected; and nothing else would effectuate the salutary purpose of Congress to permit consolidations of carriers that are economically desirable and at the same time to subject them to the authority of its appointed agent.

This interpretation of the statute depends upon the breadth to be given the term "control," as used in Section 5 (2) (a) of the Transportation Act of September 18, 1940, under which the Commission now operates. Fortunately the legislative history

90 clearly indicates the meaning which Congress had in mind.

The conference report on the Transportation Act of 1940, H. R. 2832, 76th Congress, 3d sess., p. 63, contains the following passage:

"Section 2 (b). Definition of Control:

"This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of 'control' which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term 'person' is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

"The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1 (1) (a) and section 15 (4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp. v. United States* (307 U. S. 125, decided April 17, 1939)."

Section 1 (3) (b) of the Act of 1940, heretofore quoted in the opinion of the court, provides that control, as used in Section 5 and other sections, shall be construed to include actual as well as legal control whether exercised through circumstances surrounding organization or operation, through common directors, officers or stockholders, voting trusts, holding companies, "or through or by any other direct or indirect means." This language was used because, as the conference report shows, language of like breadth in Section 2 of the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. A., Section 152 (b), had been recently interpreted by the Supreme Court in *Rochester Corp. v. United States*, 307 U. S.

125, 145, where the court said:

91 "The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'"

The opinion of the Supreme Court also referred to House Report 1850, 73 Congress, 2d session, 4-5, which considered the proposal to make use of the terms "parent," "subsidiary," and "affiliated" in respect to the corporate relations of common carriers

in the Communication Act of 1934. The report contained the following passage:

"Many difficulties are involved in attempting to define such terms. It is believed that a more satisfactory result will be reached by referring to such persons as in the Senate bill and the amendment. No attempt is made to define 'control' since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors."

The intent of Congress to include within the purview of Section 5 (2) (a) all means by which control of a carrier may be acquired is further shown by contrasting the terms of that section with those of the corresponding section, to wit: Section 213 (a), of the Motor Carrier Act of August 9, 1935, 49 Stat. 543, 555. In the earlier statute the acquisition of control which subjected the transaction to regulation by the Commission was such as occurs in corporate consolidation or merger, or in purchase, lease or contract to operate carrier property, or in purchase of the stock of a corporate carrier. When the same subject was treated in Section 5 (2) (a) of the latter Act, Congress was careful to add the words "or otherwise" to the description of specific methods by which carrier control might be acquired. Clearly Congress desired to avoid the limitation of control to that acquired through any particular method.

If these guides to the intention of Congress are observed, it seems impossible to give to the statute the literal and narrow construction for which the plaintiffs contend; and the prior reports of Division 4 of the Commission, in which this construction was adopted without contest, lose their significance. Keeping in mind that the test is actual rather than legal control, whether exercised directly or indirectly, it is futile to point out that the pending transaction contemplates the purchase of Marshall's property and its extinction as a corporate carrier. The reality is that Refiners will acquire the property and operating rights of Marshall, and thereupon, through the instrumentality of Refiners,

Union will acquire control of another carrier. The same conclusion must be reached, if the purpose of Congress to subject motor carriers to the jurisdiction of the Commission is to be carried out, when Union, through its subsidiary, indirectly accomplishes the same result by the purchase of carrier property or by corporate merger or by other means. Under any other view, Union could expand its control over the motor carrier field indefinitely without itself submitting to the regulatory power of the Commission.

The pertinence of these observations to the peculiarities of the business of motor transport with which the Commission is familiar is shown by the following passage from its final report:

93 "There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute. As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities outstanding, evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts 'receivable' representing outstanding freight bills, etc. Their 'liabilities' often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It often is quite simple under these circumstances to acquire for cash the 'assets' including certificate and goodwill, and to assume or pay the 'liabilities,' and to liquidate the concern. Proceeding thus through a controlled subsidiary, a noncarrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of 'control' as used in the Act."

The decision of the Commission should be sustained, and the bill of complaint should be dismissed.

94 In the United States District Court for the District
of Maryland

[Title omitted.]

Findings of Fact and Conclusions of Law

Filed Nov. 1, 1943

Upon final hearing in this suit the following findings of fact and conclusions of law are made:

FINDINGS OF FACT

1. The Interstate Commerce Commission on September 2, 1943, entered an order of dismissal effective October 17, 1943, dismissing an application filed by plaintiffs in a proceeding pending before the Interstate Commerce Commission designated Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall, bearing its docket No. MC-F-1286.

2. Said proceedings before the Interstate Commerce Commission arose upon an application filed by plaintiffs asking for authority for Marshall Transport Co., Inc., a motor common carrier subject to Part II of the Interstate Commerce Act, to sell certain interstate operating rights and for Warren C. Marshall to sell certain carrier properties to Refiners Transport & Terminal Corporation, also a motor common carrier subject to Part II of the Interstate Commerce Act, pursuant to a contract made between the parties dated July 8, 1942. Such authority was requested under Section 5 (2) (a) of the Interstate Commerce Act. There is no dispute about the facts, and they are fully set forth in the
95 report of Division 4 of the Interstate Commerce Commission as such findings were adopted by the full Commission.

3. The Interstate Commerce Commission found and concluded that said application could not duly be approved because it was filed by Refiners Transport & Terminal Corporation without joinder therein of the owner of 82.6% of the total issued and outstanding capital stock of Refiners Transport & Terminal Corporation, such stock interest being owned by Union Tank Car Company, a New Jersey corporation.

CONCLUSIONS OF LAW

1. The transaction proposed falls precisely within the permissive phrase of Section 5 (2) of the Interstate Commerce Act:

"(a) It shall be lawful, with the approval and authorization of the commission, as provided in subdivision (b) * * * (i)

for any carrier to purchase . . . the properties . . . of another . . .

"(b) Whenever a transaction is proposed under subparagraph (a), . . . the carriers . . . seeking authority therefor shall present an application to the commission . . ."

2. The carriers seeking authority therefor presented an application to the Commission and said application should not have been dismissed.

3. Said proceeding arose under Part II of the Interstate Commerce Act, and the Commission issued a negative order solely because of a supposed lack of power, and the Complaint in this suit was filed by parties of interest under the Urgent Deficiency Appropriation Act of October 22, 1913, and this Court does hereby determine that the Interstate Commerce Commission has authority and power and jurisdiction to hear the application of Refiners Transport & Terminal Corporation on the merits without the joinder of Union Tank Car Company in the application.

4. It is hereby directed that a judgment shall be entered enjoining, setting aside and annulling the dismissal order of the Interstate Commerce Commission entered in said proceedings and enforcing by writ of mandatory injunction the Commission's taking jurisdiction of said application as filed with said Commission and proceeding to final disposition thereof in accordance with these findings and conclusions.

Dated: November 1 1943.

WILLIAM C. COLEMAN,
William C. Coleman,
District Judge.

W. CALVIN CHESNUT,
W. Calvin Chesnut,
District Judge.

MORRIS A. SOPER, Circuit Judge, dissenting.

97 In the United States District Court for the District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT CO., INC., A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT & TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS vs. UNITED STATES OF AMERICA, DEFENDANT

Judgment

Filed November 1, 1943

This suit came on for hearing before Honorable Morris A. Soper, Circuit Judge; Honorable William C. Coleman, District

Judge; and Honorable W. Calvin Chesnut, District Judge, in accordance with the statutes in such case made and provided, and thereupon, upon consideration of the pleadings, the oral arguments and brief of plaintiffs, defendant, and intervenors, and a certified copy of the record of the Interstate Commerce Commission in the matter of the application of Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co., Inc., and Warren C. Marshall, bearing its docket No. MC-F-1936, the Court having made finding of fact specially and conclusion of law, and at the hearing it having been agreed that the matter should be submitted for final order or decree, as well as upon the application for preliminary injunction, plaintiffs' motion for an interlocutory injunction is granted and as a final order, decree, and judgment.

It is ordered that the order of dismissal of the Interstate Commerce Commission entered in the above-mentioned proceedings is hereby enjoined, set aside, and annulled, and this Court does hereby enforce by writ of mandatory injunction the Commission's taking of jurisdiction of the application as filed with said Commission without Union Tank Car Company's becoming a party applicant, and proceeding to final disposition thereof in accordance herewith. The clerk is hereby directed to enter this judgment.

Dated: November 1, 1943.

WILLIAM C. COLEMAN,
William C. Coleman,
District Judge.

W. CALVIN CHESNUT,
W. Calvin Chesnut,
District Judge.

MORRIS A. SOPER, Circuit Judge, Dissenting.

99 In the District Court of the United States for the
District of Maryland,

[Title omitted.]

Petition for appeal

Filed Dec. 17, 1943

The United States of America, defendant, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, Intervenor, in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of Maryland, entered November 1, 1943,

pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendant and intervenors consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said defendant and intervenors pray that a transcript of the record, proceedings, and papers upon which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated December 17, 1943.

WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United State Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.
CHARLES E. COTTERILL,
HAROLD G. HORNLY,

For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

101 In the District Court of the United States for the District of Maryland

[Title omitted.]

Assignment of errors

Filed Dec. 17, 1943

Come now the United States, defendant, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, intervenors, in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the

United States herewith petitioned for in said cause from the decree of the District Court of the United States for the District of Maryland, entered November 1, 1943:

102 The Court erred in holding that the conclusion reached by the Commission as to its authority and jurisdiction under section 5 (2) (a) of the Interstate Commerce Act is not in accord with the intention of the statute to be gathered from its plain wording and from its historical development.

The Court erred in holding that the "noncarrier control clause" of section 5 (2) (a) is not restrictive of the Commission's authority to act on the "carrier purchase clause."

The Court erred in holding that the application in this case was in fact made by the real party in interest within the statutory interest.

The Court erred in holding that the Commission has authority to hear the application of Refiners and Transport on the merits without the formal joinder of Union in the application.

The Court erred in directing that a judgment shall be entered, enjoining, setting aside and annulling the dismissal order of the Commission of September 2, 1943, and enforcing by writ of mandatory injunction the Commission's jurisdiction of said application as filed with the Commission and proceeding to final disposition thereof on the merits.

The Court erred in entering the final decree of November 1, 1943.

The Court erred in failing to find that the complaint was without equity.

The Court erred in failing to dismiss said complaint.

Dated December 17, 1943.

103

WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,

ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.

DANIEL W. KNOWLTON,
Chief Counsel,
DANIEL H. KUNKEL,

Attorney,
For Interstate Commerce Commission.

CHARLES E. COTTERILL,
HAROLD G. HERNLY,

For Costal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

104

In the District Court of the United States for District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT COMPANY, A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

and

THE INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES, INC., LEAMAN TRANSPORTATION COMPANY, PETROLEUM TRANSPORT COMPANY, SHIPLEY TRANSFER COMPANY, VEDDER TRANSPORTATION COMPANY, M. I. O'BOYLE & SON, CLARE M. MARSHALL, WILLIAM F. CROSSETT, AND RICHARD F. KLINE, INTERVENORS

Order allowing appeal

Filed Dec. 17, 1943

In the above-entitled cause, defendant and defenant intervenors having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered November 1, 1943, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided, it is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

And it is further ordered that petitioners other than the United States and the Interstate Commerce Commission, give bond
105 in the sum of \$250.00 as a cost bond.

Dated December 17, 1943.

WILLIAM C. COLEMAN,
United States District Court Judge.

106

[Citation in usual form showing service on Robert W. Williams, omitted in printing.]

115

In the District Court of the United States for the District of Maryland

[Title omitted.]

Notice of appeal

Filed Dec. 20, 1943

To the Attorney General for the State of Maryland:

You are hereby notified that the District Court of the United States for the District of Maryland, on December 17, 1943, filed and

entered an order allowing an appeal by the United States, the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline to the Supreme Court of the United States
 116 from a decree filed and entered on the 1st day of November 1943, in the above-entitled cause, and that the citation signed by such court on December —, 1943, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United State, and the statement required to be served on the appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, sec. 47a, Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated December 17, 1943.

WENDELL BERGE,
Assistant Attorney General,
 BERNARD J. FLYNN,
United States Attorney,
 ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.
 DANIEL W. KNOWLTON,
Chief Counsel,
 DANIEL H. KUNKEL,
Attorney,

For Interstate Commerce Commission.

CHARLES E. COTTEHILL,
 HAROLD G. HERNLY,

For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

This is to certify that the above notice of appeal was served upon the Attorney General for the State of Maryland on December

18, 1943, by depositing the same together with attachments in the United States Mail in franked envelopes addressed to him at Annapolis, Maryland.

DANIEL H. KUNKEL,
For Interstate Commerce Commission.

121 In the District Court of the United States
For the District of Maryland

[Title omitted.]

Motion for order directing clerk to transmit original exhibits in lieu of copies

Filed Dec. 27, 1943.

And now comes the United States, defendant, and the Interstate Commerce Commission, Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, intervenors, and move the Court for an order directing the Clerk of Court to transmit to the United States Supreme Court the record before the Interstate Commerce Commission in Docket No. MC-F-1936, as introduced in evidence in the trial of this cause, in lieu of a copy thereof.

Dated December 21, 1943.

122

WENDELL BERGE,
Assistant Attorney General,
BERNARD J. FLYNN,
United States Attorney,
ROBERT L. PIERCE,
Special Assistant to the Attorney General,
For the United States.

DANIEL W. KNOWLTON,
Chief Counsel,

DANIEL H. KUNKEL,
Attorney,
For Interstate Commerce Commission.

CHARLES E. COTTERILL,
HAROLD G. HERNLY,

For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

December 22, 1943, Marshall Transport Co., Inc., Warren C. Marshall, and Refiners Transport and Terminal Corporation, plaintiffs-appellees, consent to the entry of the order in the form attached.

ROBERT W. WILLIAMS.

123

Order of court

Upon consideration of the within motion and it appearing that plaintiffs-appellees consent to the entry of the order sought by said motion,

It is ordered, that the Clerk of Court transmit to the United States Supreme Court, as part of the record on appeal, the record before the Interstate Commerce Commission in Docket No. MC-F-1936, as introduced in the trial of this cause, in lieu of a copy thereof.

By the Court.

WILLIAM C. COLEMAN,

United States District Court Judge.

Dated December 27th, 1943.

124 In the District Court of the United States for the District of Maryland

[Title omitted.]

Appellants' praecipe for transcript of record

Filed Dec. 27, 1943

To the clerk of the above-named court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to wit:

- (1) The complaint.
- (2) Motion for Interlocutory Injunction.
- (3) Notice of Hearing on Motion for Interlocutory Injunction.
- (4) Answer of the United States.
- (5) Intervention and answer of Interstate Commerce Commission.
- (6) Petition of Coastal Tank Lines, Inc., et. al., for leave to intervene and order of allowance.
- 125 (7) Record before Interstate Commerce Commission in Docket No. MC-F-1936 (Original to be transmitted in lieu of copy pursuant to order of court), as introduced in evidence at the trial of the above-entitled cause.
- (8) The majority opinion filed October 16, 1943.

- (9) The dissenting opinion of U. S. Circuit Judge Soper.
- (10) Findings of fact and conclusions of law entered by the District Court entered November 1, 1943.
- (11) Final decree entered November 1, 1943.
- (12) Petition for appeal.
- (13) Assignment of errors.
- (14) Jurisdictional statement.
- (15) Order allowing appeal.
- (16) Citation on appeal.
- (17) Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court.
- (18) Notice to the Attorney General of the State of Maryland.
- (19) Motion and order of court for transmitting of original record before the Commission as introduced at the trial of the cause, in lieu of copy.
- (20) This praecipe.

WENDELL BERGE,
Assistant Attorney General.

BERNARD J. FLYNN,
United States Attorney,

ROBERT L. PIERCE,
*Special Assistant to the Attorney General,
For the United States.*

DANIEL W. KNOWLTON,
Chief Counsel,

DANIEL H. KUNKEL,
*Attorney,
For Interstate Commerce Commission.*

CHARLES E. COTTERILL,
HAROLD G. HERNLY,

*For Coastal Tank Lines, Inc., Leeman Transportation
Company, Petroleum Transport Company, Shipley
Transfer Co., Vedder Transportation Co., M. I. O'Boyle
& Son, Clare M. Marshall, William F. Crossett, Richard
F. Kline.*

Daniel H. Kunkel upon his oath deposes and says that he is one of the attorneys of record for the Interstate Commerce Commission, one of the Intervenor-appellants herein, that he has served copies of the foregoing praecipe for transcript of record upon the plaintiffs (appellees) by depositing the same in the United States mail in Washington, D. C., on December 18, 1943, in sealed, franked envelopes, properly addressed to their attorneys of record, as follows: John T. Money, Esq., 801 Mills Building, Washington, D. C.; Robert W. Williams, Esq., c/o Ritchie, Jan-

ney, Ober and Williams, Baltimore Trust Building, Baltimore, Md.; Robert C. Winter, Esq., 2850 Penobscot Building, Detroit, Mich.

DANIEL H. KUNKEL

Sworn to and subscribed before me this 18th day of December 1943.

[NOTARIAL SEAL]

EUGENIA W. SUTER,
Notary Public.

127 In District Court of the United States for the District of Maryland

[Title omitted.]

Stipulation by appellees as to portions of record to be incorporated into the transcript thereof

Filed Dec. 30, 1943

To the Clerk of the above-named Court:

Please be advised that the undersigned appellees desire no additional portions of the record to be incorporated into the transcript to be filed in the Supreme Court of the United States, other than those parts of the record designated in "Appellants' Praecept for Transcript of Record".

REFINERS TRANSPORT & TERMINAL CORPORATION,
By ROBERT C. WINTER,
One of its Attorneys,
2850 Penobscot Building, Detroit 26, Michigan.

Dated December 23, 1943.

128 [Clerk's certificate to foregoing transcript omitted in printing.]

129 In the Supreme Court of the United States

Statement of points to be relied upon and designation of record

Filed Jan. 12, 1944

Now come the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entitled cause. Appellants further state that the entire record in this cause, as filed in this Court pursuant to praecipe for transcript of the record,

is necessary for consideration of the points specified above, with the exception of Items 2 and 3 of said transcript of record:

CHARLES FAHY,
Solicitor General,

WENDELL BERGE,
Assistant Attorney General,

BERNARD J. FLYNN,
United States Attorney,

ROBERT L. PIERCE,
*Special Assistant to the Attorney General,
For the United States.*

DANIEL W. KNOWLTON,
DANIEL W. KNOWLTON,
Chief Counsel,

DANIEL H. KUNKEL,
DANIEL H. KUNKEL,
Attorney,

For Interstate Commerce Commission.

CHARLES E. COTTERILL,

Charles E. Cotterill,

HAROLD G. HERNLY,

*For Coastal Tank Lines, Inc., Leaman Transportation
Company, Petroleum Transport Company, Shipley
Transfer Company, Vedder Transportation Company,
M. I. O'Boyle & Son, Clare M. Marshall, William F.
Crossett, and Richard F. Kline.*

CITY OF WASHINGTON,
District of Columbia, as:

Daniel H. Kunkel, being duly sworn according to law deposes and says that he is one of the attorneys of record for the Interstate Commerce Commission, one of the appellants herein and that he served copies of the above statement upon all of appellees by depositing same, properly addressed to their attorneys of record, in the United States mails at Washington, D. C., on the 11th day of January 1944, in sealed, franked envelopes, said attorneys being: Robert C. Winter, Esq., 2850 Penobscott Bldg., Detroit, Mich.; Robert W. Williams, Esq., Baltimore Trust Bldg., Baltimore, Md., John T. Money, Esq., 801 Mills Bldg., Washington, D. C.

DANIEL H. KUNKEL.
Daniel H. Kunkel.

Sworn and subscribed before me, a Notary Public, this 11th day of January, 1944.

[Seal]

EUGENIA W. SUTER.

[File endorsement omitted.]

131 In the Supreme Court of the United States

Stipulation re printing of record

Filed Jan. 31, 1944

It is hereby stipulated by and between counsel for the appellants and counsel for the appellees in the above entitled cause that only pages, 111, 122, 123, 138, 144, 224, 225, 226, 227, 228, 230, 233, 236, 237, 238, 239, 240, 241, 242, and 275 of Item 7 of the praecipe for transcript of record shall be printed and that no other part of Item 7 shall be printed as a part of the record in the above entitled cause, but that all of Item 7 shall be retained as part of said record and may be referred to by the Court and by counsel for the parties in their briefs and arguments in this cause.

Dated January 18, 1944.

Charles Fahy, Solicitor General, Wendell Berge, Attorney General, Bernard J. Flynn, United States Attorney, Robert L. Pierce, Special Assistant to the Attorney General, For the United States; Daniel W. Knowlton, Chief Counsel, Daniel H. Kunkel, Attorney, For Interstate Commerce Commission; Charles E. Cotterill, Harold G. Hernly, For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline, John T. Money, For Marshall Transport Co., Inc.; and Warren C. Marshall; Robert W. Williams, George H. Klein, Bigham D. Eblen, Robert C. Winter, Harry S. Elkins, for Refiners Transport & Terminal Corporation.

132 Supreme Court of the United States

Order noting probable jurisdiction

January 31, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 48082. Maryland, D. C. U. S. Term No. 589. The United States of America, Interstate Commerce Commission, Coastal Tank Lines, Inc., et al., Appellants vs. Marshall Transport Company, Warren C. Marshall, Refiners Transport Terminal Corporation. Filed January 10, 1944. Term No. 589 O. T. 1943.

**In the District Court of the United States
for the District of Maryland**

CIVIL ACTION No. 2051

**MARSHALL TRANSPORT COMPANY, A MARYLAND
CORPORATION, WARREN C. MARSHALL, AND RE-
FINERS TRANSPORT TERMINAL CORPORATION, A
DELAWARE CORPORATION, PLAINTIFFS**

v.

**THE UNITED STATES OF AMERICA, DEFENDANT, AND
THE INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC., LEAMAN TRANS-
PORTATION COMPANY, PETROLEUM TRANSPORT
COMPANY, SHIPLEY TRANSFER COMPANY, VEDDER
TRANSPORTATION COMPANY, M. I. O'BOYLE
& SON, CLARE M. MARSHALL, WILLIAM F. CROS-
SETT, AND RICHARD F. KLINE, INTERVENORS**

**JURISDICTIONAL STATEMENT BY THE DEFENDANT-
APPELLANTS AND THE INTERVENORS UNDER RULE 12
OF THE REVISED RULES OF THE SUPREME COURT OF
THE UNITED STATES**

The defendant-appellants and the intervenors respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has

jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 49, Section 17 (9) (Act of February 4, 1887, c. 104, Part I, sec. 17, 24 Stat. 385, as amended March 2, 1889, c. 382, sec. 6, 25 Stat. 861; August 9, 1917, c. 50, sec. 2, 40 Stat. 270; February 28, 1920, c. 91, secs. 430-432, 41 Stat. 492, 493; February 28, 1933, c. 136, 47 Stat. 1368; August 9, 1935, c. 498, sec. 1, 49 Stat. 543; September 18, 1940, c. 722, Title 1, sec. 12, 54 Stat. 913).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, sec. 1, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended February 13, 1925, c. 229, sec. 1, 43 Stat. 938; October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 45 (Act of June 18, 1910, c. 309, sec. 1, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 209, 36 Stat. 1149; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 46 (Act of June 18, 1910, c. 309, sec. 3, 36 Stat. 542; as amended March 3, 1911, c. 231, sec. 208, 36 Stat. 1149; October 22, 1913, c. 32, 38 Stat. 218).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1911, c. 231, sec. 238, 36 Stat. 1157; as amended January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. DATE OF THE DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The decree sought to be reviewed was entered November 1, 1943. The petition for appeal, together with the assignment of errors, was presented and allowed December 17, 1943.

C. NATURE OF THE CAUSE AND OF THE RULINGS BELOW

This is an appeal from a final decree of the United States District Court for the District of Maryland, entered November 1, 1943, enjoining, annulling, and setting aside an order of the Interstate Commerce Commission dated September 2, 1943, in the proceeding known as *Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Company—Warren C. Marshall*, 39 M. C. C. 93, 39 M. C. C. 271. The decree also directed the Commission to take jurisdiction of the proceeding as filed with it and to proceed to final disposition thereof.

The proceeding before the Commission was instituted under the provisions of Section 5 (2) (a) of Part I of the Interstate Commerce Act (49 U. S. C. 5 (2) (a)).¹ It is there provided that it shall be lawful, with the approval and authorization of the Commission, for any carrier "to purchase, lease, or contract to operate the properties, or any part thereof of another [carrier]; * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *." By joint application, the plaintiffs sought authority from the Commission for the purchase by Refiners Transport & Terminal Corporation, a common carrier by motor vehicle subject to Part II of the Act, of the operating rights and property of Marshall Transport Company, Inc., also a common carrier by motor vehicle subject to Part II of the Act, and certain equipment and terminal properties of Warren C. Marshall used by the Marshall Company in the conduct of its operations. Certain motor carriers, intervenors herein, opposed the application.

It developed at the hearing, and the Commission subsequently found, that the Refiners Company was controlled by Union Tank Car Company, a non-carrier company, through the ownership of

¹ All of Section 5 applies to any common carrier "subject to * * * Part II" of the Act. Part II comprises the Motor Carriers Act of 1935.

82.6 per cent of the former's outstanding capital stock. One of the contentions of the protestants was that Union Tank Car Company was the real party in interest and that it was a necessary applicant under the non-carrier control clause of Section 5 (2) (a). A majority of Division 4 of the Commission (Commissioners Porter and Miller, Commissioner Mahaffie dissenting) overruled this contention by a report and order of April 5, 1943, holding that the words "or otherwise" of the non-carrier control clause, *supra*, did not embrace an acquisition by outright purchase of property and operating rights but only "methods by which control of an additional separate and continuing carrier could lawfully be effected other than through stock ownership, * * *." (39 M. C. C. 93, 101.)

Upon petitions for reconsideration filed by protestants and also by the Antitrust Division of the Department of Justice, this issue was submitted to the entire Commission. By report of August 3, 1943, the Commission reversed the holding of Division 4 with respect to the application of Section 5 (2) (a) and found that it was without power to approve the purchase in the absence of an appropriate application of the controlling corporation, the Union Tank Car Company. The order dismissing the application was deferred for a period of twenty days in order to afford an opportunity for the Union Tank Car Company to comply with this finding. The Union Tank Car

Company having failed to act within the period set, the Commission entered an order on September 2, 1943, dismissing the application. It is the validity of this order which was challenged by the complaint herein.

The complaint was filed on September 17, 1943. The case was heard on final hearing on September 20, 1943, before United States Circuit Judge Soper and District Judges Chesnut and Coleman, sitting as a statutory court organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220). The Interstate Commerce Commission and certain protestants before the Commission intervened. The record before the Commission was offered and received in evidence, and the matter was argued orally by the several parties.

The single question involved was the power of the Commission under Section 5 (2) (a) to hear and dispose of, on the merits, the application of Refiners Company without the joinder in the application of Union Tank Car Company, the non-carrier which controlled it.

By opinion of District Judge Chesnut, filed October 16, 1943, a majority of the Court held that the non-carrier control clause of Section 5 (2) (a) was not applicable to the purchase by a carrier subsidiary of a non-carrier company, of the property and operating rights of another carrier so as to disable the Commission from hearing and determining upon the merits the subsidiary's

application for authority to purchase without the formal joinder of the controlling corporation. Circuit Judge Soper in a dissenting opinion reached the opposite conclusion. He held that the Commission had properly construed the statute and that the joinder of the controlling corporation in the application was a necessary condition under the statute to the grant of the authority sought.

The question presented by this appeal is a substantial one. It involves the construction and application of a portion of the statute conferring power on the Interstate Commerce Commission. In view of the conflict of opinion as to the proper interpretation of Section 5 (2) (a), both within the Commission and the specially constituted court, it is important that the issue be set at rest by the Supreme Court. From an administrative standpoint also, it is important that this issue be finally determined, for an authoritative determination will affect a large number of applications now pending under Section 5 (2) (a) before the Commission.

**D. CASES SUSTAINING THE SUPREME COURT'S
JURISDICTION ON APPEAL**

United States v. Baltimore & Ohio R. Co., 293 U. S. 454. *Rochester Telephone Corp. v. United States*, 307 U. S. 125. *United States v. Lowden*, 308 U. S. 223.

Interstate Commerce Commission v. Railway Labor Executives Ass'n, 315 U. S. 373.

II. DECREE AND OPINION OF THE DISTRICT COURT

Appended to this statement are copies of the majority opinion, the dissenting opinion of Circuit Judge Soper, the findings of fact, conclusions of law, and the final decree of the District Court, sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

✓ **CHARLES FAHY,**
Solicitor General,

BERNARD J. FLYNN,
United States Attorney,

✓ **WENDELL BERGE,**
Assistant Attorney General,

✓ **ROBERT L. PIERCE,**
Special Assistant to the Attorney General,
for the United States of America.

✓ **DANIEL W. KNOWLTON,**
Chief Counsel,

✓ **DANIEL H. KUNKEL,**
Attorney,
for the Interstate Commerce Commission.

✓ **CHARLES E. COTTERILL,**
✓ **HAROLD G. HERNLY,**

For Coastal Tank Lines, Inc., Leaman Transportation Company, Petroleum Transport Company, Shipley Transfer Company, Vedder Transportation Company, M. I. O'Boyle & Son, Clare M. Marshall, William F. Crossett, and Richard F. Kline.

Dated December —, 1943.

In the District Court of the United States for the
District of Maryland

Civil Action No. 2051

MARSHALL TRANSPORT COMPANY, A MARYLAND CORPORATION, WARREN C. MARSHALL, AND REFINERS TRANSPORT TERMINAL CORPORATION, A DELAWARE CORPORATION, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Before SOPER, Circuit Judge, and COLEMAN and
CHESNUT, District Judges

Filed October 16, 1943

CHESNUT, D. J.: The plaintiffs in this action seek a temporary restraining order and a temporary injunction to stay the enforcement of and to set aside an order entered by the Interstate Commerce Commission on September 2, 1943, which rejected and dismissed an application of the plaintiffs for authority to consummate a sale of certain motor-vehicle common carrier operating rights and certain motor vehicles, equipment, and facilities to Refiners Transport and Terminal Corporation. The Commission dismissed the application because it was of opinion that it had no

(9)

jurisdiction to entertain it since the Union Tank Car Company, a New Jersey corporation, the owner of 82.6 percent of the outstanding stock of Refiners, was not a party thereto. The bill of complaint also prayed the issuance of a mandatory injunction requiring the Commission to take jurisdiction of the application and to consider it upon its merits. This court was organized to consider the case under the appropriate statutory provisions. See § 17 (9) and § 205 (g) of the Interstate Commerce Act, 49 U. S. C. A. §§ 17 (9), 305 (g); and the provisions for judicial review codified in 28 U. S. C. A. §§ 41, 43-48, 45 (a) and 47 (a); See, also, *Rochester Telephone Corp. v. United States*, 307 U. S. 125. The Interstate Commerce Commission and certain protesting motor-vehicle carriers have intervened.

The facts, set out at length in the report of the Commission filed April 5, 1943, are not in dispute. Marshall Transport Company, Inc., is incorporated and has its principal place of business in Maryland. The Transport Company holds a certificate of public convenience and necessity as successor in interest to Marshall under the "grandfather" clause, §§ 206, 207, Interstate Commerce Act, 49 U. S. C. A. §§ 306, 307, so that the corporation is authorized to conduct operations in interstate commerce as a motor-vehicle common carrier of petroleum products in bulk in tank trucks over irregular routes in Maryland, Delaware, Pennsyl-

vania, Virginia, and Washington, D. C. All of Transport's outstanding capital stock except two qualifying shares is owned by plaintiff Warren C. Marshall, who is also president of Transport. Transport has title to certain physical property consisting of shop and garage equipment, office furniture and equipment, and material and supplies. However, Marshall personally owns the automotive equipment employed by Transport, which is used by the latter under a leasing arrangement, and also certain real estate at Glen Burnie, Maryland, employed as a terminal by Transport. It was these operating rights and this property, whether owned by Transport or Marshall, which Refiners sought authority to purchase in the instant application. Refiners also has pending before the Commission several other applications for the purchase of petroleum motor carriers operating in the eastern states.

Refiners Transport and Terminal Corporation is incorporated and has an office in Wilmington, Delaware, and operating offices in Detroit, Michigan. It holds a certificate of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier by motor vehicle of petroleum and petroleum products in territory in Michigan, Ohio, Indiana, Illinois, Wisconsin, Missouri, Kentucky, Pennsylvania, and West Virginia. The organization of Refiners and of Union Tank Car Company are described in the

following passage from the report of the Commission:

Refiners' Organization

Refiners is the result of a consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3. (These rights were acquired from its predecessor, Petroleum Transit Corporation, pursuant to authority granted in Nos. MC-FC 14544 and MC-FC 14544-A on February 24, 1941.) It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 percent of its outstanding common capital stock, par value \$10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 percent of such outstanding capital stock is owned by 10 stockholders, the largest block (approximately 22 percent of the total out-

standing) being held by the Rockefeller Foundation, New York, N. Y. No stock is owned by a rail or water carrier and only 100 shares thereof are owned by a motor carrier. (Motor Express, Inc.) It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latter's tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 percent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one B. C. Graves, being also one of the five directors of Refiners. He is not an officer of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through

stock ownership, and it is against the policy of the company for its directors to hold offices in other companies. Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents.

For complete details of the corporate organization and history of Refiners see the report on this corporation's application to the Commission for authority to issue additional stock found in 36 M. C. C. 789.

Only July 8, 1942, an agreement of sale was executed between Transport and Marshall, as vendors, and Refiners, as purchaser, whereby Refiners purchased for the sum of \$142,000 the operating rights and properties of Transport and certain equipment and terminal facilities of Marshall in Pennsylvania used by Transport in its operations. Shortly thereafter Transport took title to 10 tractors and 10 trailers with tires included in the purchase for \$36,500, the remainder of the purchase price to be subject to certain adjustments and to be paid upon the approval and consummation of the sale. On July 18, 1942, Refiners purchased other equipment of Marshall for the sum of \$6,000.

Application to the Commission for authority to consummate the purchase was duly made by the parties to the contract and Refiners has since operated the property, first under temporary authority granted by the Commission under Sec.

210 (b) of the Act, 49 U. S. C. A. § 310 (b), and subsequently under a temporary lease, expiring October 17, 1943, executed with the authority of the Commission purporting to be based upon the provisions of § 5 (2) (a) of the Act, 49 U. S. C. A. § 5 (2) (a). The application came up for hearing before Division 4 of the Commission upon a favorable report of an examiner of the Commission and exceptions thereto filed by certain protesting carriers and by the Anti-Trust Division of the Department of Justice which had appeared at the examiner's hearing. Authority to consummate the purchase was granted by the Division in accordance with its report filed on April 5, 1943, one Commissioner dissenting. Subsequently the matter came up for rehearing before the whole Commission which held in a report filed August 3, 1943, two Commissioners dissenting, that the application could not be lawfully approved because Union Tank Car Company, the owner of 82.6 percent of Refiners' outstanding stock, was not joined as an applicant therein. The Commission stated that it would dismiss the application but would defer its order for twenty days in order that Union might have an opportunity to file an application. Union did not avail itself of this opportunity and accordingly the Commission on September 2, 1943 issued its order, effective October 17, 1943, dismissing the application. The present case was instituted to set aside this

order and require the Commission to consider the application on its merits.

The case turns upon the construction to be given to § 5 (2) (a) (i) of the Act, which is as follows:

§ 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

The pertinent clauses in this section of the statute are those which make it "lawful with the approval and authorization of the Commission * * * for any carrier * * * to purchase * * * the properties * * * of another"; or, "for a person which is not a carrier and which has control of one or more carriers to

acquire control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (b) provides that whenever a transaction is proposed under § 5 (2) (a) the carrier or person seeking authority therefor shall present an application to the Commission which shall afford a reasonable opportunity for interested parties to be heard, and if the Commission finds that the transaction is consistent with the public interest, it shall enter an order approving the transaction upon terms and conditions which it shall find to be just and reasonable.

Other references in the statute to the control of one person or corporation by another, which would be considered in determining the meaning of the word "control" in § 5 (2) (a) are found in § 1 (3) (b) and § 5 (4) as follows:

§ 1 (3) (b). For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect

means; and to include the power to exercise control.

§ 5 (4) It shall be unlawful for any person, except as provided in paragraph (2) to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

The essential controversy is whether the statute is satisfied by securing the approval and authority of the Commission to consummate the sale upon the joint application of Transport and Refiners, or whether Union, as the owner of the majority of Refiners' stock, must also be joined in the application. The significance of the decision resides in the requirements of § 5 (3) of the Act which subjects to the jurisdiction of the Commission any person, other than a carrier, who ac-

quires control of a carrier with the approval of the Commission. Section 5 (3) is as follows:

5 (3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control; Section 20 (1) to 10, inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

It is important to appreciate the precise, and limited, point that we are called upon to decide. Division 4 of the Commission after hearing the evidence and argument by counsel for the applicants and protestants, considered both the merits of the case and the applicable law. It found the application was made by proper parties under the statute, that the transaction was reasonable and would be in the public interest and it thereupon ordered that the application be approved, subject to certain conditions not here material. Thereafter on application by the protestants the full Commission reconsidered the case, did not pass upon the merits, but dismissed the application on the ground that the majority stockholder of Refiners, the purchasing carrier, was not a party to the application. The final conclusion of the Commission was thus expressed:

We find and conclude that the instant application may not lawfully be approved in the absence of an appropriate application by the real party in interest, the controlling corporation, Union. The application should be dismissed. Entry of an order dismissing the application will be deferred for a period of 20 days from the date of service of this report in order to afford an opportunity for Union to file an appropriate application. In view of this conclusion further discussion of other contentions now of record is unnecessary.

The conclusion thus reached was not based upon the nature or particularities of Union in the field of transportation or otherwise, but solely on the ground that the Union was a corporation which owned a majority of the capital stock of Refiners, the purchasing motor carrier. The rationale of the Commission's decision is equally applicable to any person or corporation, not a carrier, which owns or controls a majority of the stock of a carrier corporation. And the necessary result therefore is that the Commission lacks authority—power or jurisdiction—to grant any application by one motor carrier for the purchase of the property and operating rights of another motor carrier, unless the majority stockholder of the purchasing carrier formally joins in the application. In reaching this conclusion the Commission departed from its long consistent prior practice to the contrary. As was said by Commissioner Porter in his dissenting opinion:

Thus for more than seven years we have decided hundreds of applications like the instant one without the majority stockholder of purchaser being a party applicant; but suddenly the majority penalizes this particular purchaser for following the procedure which we ourselves long since established.

We think the conclusion reached by the Commission is not in accord with the intention of the statute, to be gathered not only from what seems

to us its plain wording, but also from its historical development.

The application in the instant case falls precisely within the permissive phrase of section 5 (2) (a) that it shall be lawful with approval and authorization of the Commission "for any carrier * * * to purchase * * * the properties, or any part thereof, of another." The construction of the statute by the Commission excludes the force and effect of this express authority to the Commission on the ground that it is superseded in the instant case by a subsequent permissive authority given to the Commission "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." That is to say, the construction of section 5 (2) (a) by the Commission takes away the authority of the Commission to even consider any application by one motor carrier for the property of another whenever the purchasing carrier has a majority stockholder, unless the latter is a party applicant.

The grammatical structure and working of section 5 (2) (a) very clearly shows that authority was given to the Commission to consider and act upon applications made by (a) a carrier or carriers and (b) a noncarrier in different types of cases and that the Commission was given such authority to act in any one of the several enumerated situations. Thus, if an applicant or appli-

cants are carriers the Commission is given authority to (1) permit them to consolidate or merge their properties or franchises; (2) to purchase, lease or contract to operate the properties of another carrier; or (3) to acquire control of another carrier through stock ownership or otherwise. And if the applicant is not a carrier, it may, with the permission of the Commission, acquire control of *two or more carriers* through stock ownership or otherwise; and if the applicant has control of only one carrier, it may likewise acquire control of another carrier through stock ownership or otherwise. These several situations in which the Commission is given authority to act are clearly made separate and independent in the statute; but the construction adopted by the Commission has the effect of making the permitted situations in which a carrier or carriers may apply to the Commission alone, dependent upon the last enumerated situation in which a noncarrier having stock control or otherwise of one carrier, seeks to acquire control of another. The result can only be reached on the theory that the last named permissive situation in which the Commission has authority to act eliminates or supersedes the former situation in which the Commission is expressly given the authority to act. This is not the natural construction of the wording of the section; and it is obvious that it is a construction that is not readily apparent as the consistent practice of the Commission in similar cases for

many years has been to the contrary. We think the proper meaning is that the Commission has authority to act in any one of the several permissive situations irrespective of the others. It is suggested that § 5 (2) (a), while permissive in form, is in substance made restrictive by the wording of § 5 (4), but this view is untenable as § 5 (4), making certain transactions unlawful, expressly excepts those authorized by § 5 (2) (a).

The view of the Commission that the "noncarrier control clause" is restrictive of its authority to act on the "carrier purchase" clause of § 5 (2) (a) is clearly contrary to the intention of the statute as seen in its historical development.

As is well known, the original authority of the Interstate Commerce Commission over carriers was contained in the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 380. The public policy which was at least implicit in this statute (and was expressed in the Sherman Anti-Trust Act of 1890 in a broader field) was that competition was desirable, and that carriers should be independently operated for the public benefit. Accordingly, although the original Act of 1887 was frequently amended in detail in subsequent years, the Commission was not itself given authority to permit consolidations, mergers or other combinations of rail carriers, until the passage of the Transportation Act of Feb. 28, 1920, c. 91, § 407, 41 Stat. 480. (Roberts, Fed. Liability of Carriers (1929), Vol. I, §§ 92, 93). In the

meantime, however, general economic experience, emphasized by the lessons learned from the government operation of railroads during World War I, showed that there could well be in particular situations public benefit in economies and facilities of operation by mergers or combinations of rail carriers. Thus there was written into the Transportation Act of 1920, § 5 (2), authority to the Commission to permit one carrier to acquire control of another carrier or carriers "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system," if found to be in the public interest. And indeed by § 5 (4) the Commission was directed as soon as practicable to prepare and adopt a plan for consolidation of the railway properties of the Continental United States into a limited number of systems. This proved a very difficult problem for the Commission and nothing had successfully been done thereunder up to the passage of The Emergency Railroad Transportation Act of June 16, 1933, c. 91, 48 Stat. 217, 220. But for several years prior thereto Congress had given consideration to the subject of the public policy involved in the control of two or more carriers through the medium of a "holding company." A prototype of this latter corporate device as affecting rail carriers had years before been considered by the Supreme Court in the *Northern Securities Case*, 193 U. S. 197, and had been condemned as in violation of

the Anti-Trust Act. The study by Congress of the effect of the holding company in this relation resulted in the rewriting of section 5 of the Interstate Commerce Act by the Emergency RR Transportation Act, and then there appeared for the first time, among the permissive clauses giving authority to the Commission to act, the categories with respect to persons or corporations *not carriers* acquiring control of two or more carriers through stock ownership. (See Sharfman, The I. C. C. Vol. III-A, pp. 495-501 (1935).) As then phrased the permissive clause related only to control through ownership of stock. When Congress brought motor carriers under the control of the Commission (Aug. 9, 1935, c. 498, 49 Stat. 543) it gave in very similar language in § 213 authority to the Commission to permit combinations of those carriers. Finally, by the Transportation Act of 1940 (Sept. 18, 1940, c. 722, 54 Stat. 905) water carriers were also subjected to the authority of the Commission; and the whole Interstate Commerce Act was rewritten into three parts, Part 1, dealing with rail carriers, Part 2, with motor carriers, and Part 3, with water carriers. Section 5 of the Act was rewritten to comprehensively include all three types of carriers (and an express company) in one provision regarding unifications, mergers, and acquisition of control. (See 49 U. S. C. A., § 5 (13).) At the same time there was also added in § 5 (2) (a) the words "or otherwise".

in the clause with regard to a noncarrier acquiring stock control over two or more carriers.

From this history of the legislation we see that there has been a gradual *extension* of the authority of the Commission to permit mergers and consolidations of carriers subject to its regulation. Prior to 1920 the Commission had no such authority, and the Supreme Court had held in the Northern Securities Case that indirect unified control of two otherwise competitive rail carriers through the means of a separate holding company was prohibited by the Anti-Trust Act. To meet this condition, in part at least, and thus obtain the public benefit of unified control in particular situations, Congress provided in the Transportation Act of 1920, that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by a lease, or purchase of stock, or otherwise not involving actual consolidation; and by § 5 (8) the carriers affected by the order of the Commission were to be relieved from the operation of the "antitrust laws." And by § 5 (6) the Commission was also authorized, upon special conditions, to approve the actual consolidation of rail carriers. So far the Commission had no authority to permit the unified control of *two* separate carriers by the holding company device, which was still subject to the anti-trust laws. But in

1933 Congress further broadened the authority of the Commission by permitting approval of this condition when found in the public interest. It thus appears that the noncarrier-control clause of the 1933 statute was intended to apply to a holding-company control of two or more carriers, which is a quite different condition from the one involved in the instant application.

No further change was made in the phraseology of § 5 (2) (a) until the Transportation Act of 1940 added the phrase "or otherwise" as previously noted. It appears from the Commission's opinion in this case that the chief reliance for the present construction of the Act is placed on the addition of this phrase. Indeed counsel for the United States and the Interstate Commerce Commission at the argument in this Court conceded that their position was untenable save for the change said to have been effected by the addition of this phrase "or otherwise." But we think it clear that the addition of this phrase had no such effect. It expanded and did not restrict the scope of action and authority of the Commission. That this was the intended effect is expressly stated in the only legislative history of the change which has been called to our attention. In House Conference Report, No. 2832, Aug. 7, 1940, p. 68, it was said: "1. Paragraph (2) is changed by adding the words 'or otherwise' in several places, so that acquisition of control by methods other than true ownership

of stock is authorized with Commission approval."
[Italics supplied.]

In the Congressional Record for the Senate on September 9, 1940, pp. 17848 to 17851, there is contained a statement by Senator Wheeler giving some explanation of certain provisions of the Transportation Act which, in discussing the new section 5 contains no intimation that there was any intention to effect the change in the statute now read into it by the Commission. What Senator Wheeler there said was: "The principal change in existing law on consolidations is the repeal of the provision requiring the Commission to prepare and adopt a general consolidation plan. Section 213 of the Motor Carrier Act, which related to unifications of motor carriers, is repealed, and the law governing all mergers or consolidations of carriers covered by the Act is amended by § 5 of the Interstate Commerce Act."

The basic misconception of the statute found in the Commission's present construction is in treating the noncarrier control clause of § 5 (2) (a) as restrictive or prohibitive when the history of the enactment shows clearly that it was not intended to be restrictive but permissive. In this respect the effect of the Commission's present position is to reverse the consistent progressive congressional policy in broadening the authority of the Commission to deal with various types of cases involving control of two or more carriers.

This misconception seems to be due to a confusion between the permissive clause of § 5 (2) (a) and the prohibitive clauses of §§ 5 (4), (5), and (6). Until 1933 noncarrier control of two or more carriers was prohibited, not by the Interstate Commerce Act, but by the Anti-Trust Act. (See the discussion in Sharfman, *supra*, Vol. III A, p. 435 et seq.) When in 1933 Congress extended the authority of the Commission to permit noncarrier control of two or more carriers through stock ownership (that is a holding company) it also for the first time in the Interstate Commerce Act was at pains to expressly prohibit unified control of two or more carriers in any other way than those permitted in § 5 (2) (a). The effect of these sections taken together was that the Commission had authority to permit unified control by a noncarrier holding company, but not by other types of noncarrier control. The 1940 Act by adding the phrase "or otherwise" to the clause further extended the authority of the Commission in this respect.

The construction of the statute now adopted by the Commission is not necessary to the public interest in the regulation of carriers. When a noncarrier acquires control of two separate carriers (without Commission approval) there exists the possibility of disadvantage to the public interest in that one carrier may be managed in the interest of another carrier. (See § 5 (6).) To prevent this it is made unlawful for the noncar-

rier to acquire such control without the Commission's approval, which is to be obtained only upon an application to the Commission by the non-carrier which may then be subjected to such conditions as may be thought necessary by the Commission in the public interest to the extent authorized by § 5 (3). Without discussing such permissible conditions in detail it is sufficient to say that their general purpose is to preserve the integrity and efficiency of the separate carriers to the extent necessary for the public interest. Without such Commission control over the non-carrier, the Commission would have no authority to restrain its possible prejudicial activities. But when the application is made directly by one or more carriers to the Commission, the latter has full and complete authority over them by the statute to the extent of the public interests involved. In the instant case where the carrier is directly applying to the Commission to purchase the property and franchises of another motor carrier which will then cease to function as a carrier, it seems quite impossible to infer that there could be public disadvantage by reason of lack of authority of the Commission to fully deal with the matter on the merits.

In dismissing the application in this case the Commission referred to Union, the majority stockholder of Refiners, as the "real party in interest." We understand this to mean no more than that the Commission felt it had no authority to con-

sider the application by reason of its construction of the statute. But it is proper to say that in our opinion the application in this case was in fact made by the real party in interest within the statutory intent. It is a common concept of corporation law that there is a distinct difference between a corporation and its stockholders. *Pullman Car Co. v. Mo. Pac. Ry. Co.*, 115 U. S. 587, 597; *Hazeltine Corp. v. Gen. Elec. Co.*, 19 F. Supp. 898, 900. On the mere question of the jurisdiction of the Commission under the statute, there is no occasion in this case to go behind the direct action of the corporation itself. Our attention has not been called to any evidence in this record that the application by Refiners was anything other than due corporate action. The fact that its majority stockholder may have also approved it is immaterial. If at the hearing on the merits the Commission finds there are special reasons affecting the public interest growing out of the particular situation of Union in the field of transportation, that is a matter which the Commission can, of course, properly consider on the merits. We have no occasion to consider it here. It is not denied that on the merits the Commission has ample authority to inspect the books and records of Union so far as relevant to the case. See 49 U. S. C. A., § 320 (d). On the other hand the construction adopted will tend to the public disadvantage in discouraging applications for car-

rier consolidation which may really be in the public interest.

Some of the discussion in the opinion of the Commission seems to confuse the question of the authority of the Commission with the merits of the particular application. Thus it is said that Union, as majority stockholder of Refiners, might furnish additional capital for the purchase of properties of other motor carriers and thus through its subsidiary (Refiners) expand indefinitely in the field of motor transportation. But the complete answer to this suggestion is that no purchase proposed directly by Refiners, even though stimulated by its majority stockholder, could be made effective without the approval of the Commission on the merits. In holding that the Commission has the authority under the statute to consider the application in the instant case, we do not intimate or imply any opinion whatever with regard to whether the Commission should approve the application on the merits. Indeed as appears from the Commission's report and the record of the case, numerous other objections on the merits have been interposed to the approval by the Commission. We have no occasion to consider them. All we hold is that on the proper construction of the statute the Commission has authority to consider the application. At the hearing here inquiry was made from the Bench as to whether counsel for the defendants

interpreted the order of the Commission as amounting to a dismissal on the merits or only on the jurisdictional ground. The response of counsel for the Interstate Commerce Commission was that the latter was the only possible interpretation of the Commission's opinion and order, and so it seems to us.

The principal argument advanced by counsel for the defendants in support of the Commission's order is that, when Refiners buys the property of Transport, Union, as the majority stockholder of Refiners, will thus acquire control of Transport and therefore the case falls within the noncarrier control cause of 5 (2) (a). It is correctly said that if Union had itself acquired stock control of Transport, the transaction would be directly within the noncarrier control clause; and it is argued that a purchase of the property and franchises of Transport by Refiners is likewise an acquisition of control by Union. Attention is also called to the broad definition of control contained in the statute and to the legislative intention that it is to be interpreted in the light of the decision of the Supreme Court in *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (see C.F.C. Report, *supra*, p. 635).

For the reasons heretofore indicated we think this argument, so far as it is sound, goes to the merits of the particular application rather than to the authority of the Commission to consider it. We are in accord with the view that the word

"control" should have the broad construction indicated, but as we find the noncarrier control clause is not restrictive of the carrier purchase clause, and is therefore not applicable to the instant situation, it is unnecessary to the decision here to determine the full extent of the word "control." But it is not inappropriate in this connection to point out that the breadth of construction must necessarily be limited by the main purpose of the statute, which was to prevent unfair domination and management of one carrier for the advantage of another. Such a condition can exist only where there are two going carriers. In the instant case if the application of the carriers is granted by the Commission there will result but one carrier, a majority of whose stock will be owned by Union. We do not think it was the intention of the statute to make the non-carrier control clause applicable to such a situation, at least with respect to the authority of the Commission to consider the application. If the particular relationship of Union in the whole situation is deemed material by the Commission, that can be fully considered by it on the merits of the case.

At the hearing of this case it was agreed that the matter should be submitted for final order or decree as well as upon the application for preliminary injunction. We conclude that the complainants are entitled to a final order to the effect that the Commission has authority to hear the

application of Refiners and Transport on the merits without the formal joinder of Union in the application.

Counsel may submit the appropriate judgment in due course.

United States Circuit Judge.

W. CALVIN CHESNUT,

United States District Judge.

WILLIAM C. COLEMAN,

United States District Judge.

SOPER, Circuit Judge, dissenting:

It is true, as pointed out in the court's résumé of the relevant history of the statute under consideration, that Congress has recognized the economic desirability or necessity of the merger or combination of carriers in the various fields within the jurisdiction of the Interstate Commerce Commission. Through the years there has been a gradual extension of the Commission's authority to permit carrier mergers and consolidations. Equally clear, however, has been the purpose of Congress to subject these natural monopolies to regulation, and each extension of the Commission's power to permit consolidations has involved also the extension of its power and duty to secure and exercise regulatory control.

It is from this viewpoint that we must answer the question whether Union, a noncarrier which already controls through stock ownership one motor carrier, to wit, Refiners, may secure control

of another carrier, that is, Transport, by causing Refiners to purchase and operate Transport's property and privileges, and may do this without subjecting itself to the Commission's authority. It is conceded that if the transaction were to be consummated through the acquisition by Union of stock control of Transport, Union would be required by the statute to make application to the Commission. But, it is said that if Union secures substantially the same extension of its influence in the carrier field through the instrumentality of Refiners, its subsidiary, Union, may lawfully remain free from the Commission's control; or, in other words, that without subjecting itself to the Commission's control Union may extend its operations in the motor carrier field indefinitely provided only that it does not act directly as the purchaser of the property or the controlling stock interest of another carrier but secures the property or stock control thereof through the medium of its subsidiary.

This conclusion is reached very largely by centering attention upon the terms of Section 5 (2) (a) of the statute which inter alia authorize the Commission to approve, either the purchase by one carrier of the properties of another, or the acquisition by a non-carrier, which has control of a carrier, of another carrier through ownership of its stock or otherwise. Since the application of Refiners to the Commission for the approval of its purchase of transport satisfies the first al-

ternative, it is said that it is not necessary for Union to comply with the second alternative by joining in the application. It happens in this instance that the same transaction will accomplish both alternatives, for not only will Refiners thereby acquire the property of transport, but Union will secure control of transport, if a liberal rather than a strict interpretation is given to the term. It does not seem reasonable to believe that Congress intended to exempt from the Commission's control the dominant actor in such a situation; and this becomes more clear when the provisions of Section 5 (4) are given effect. Therein it is made unlawful for any person to accomplish the control in common interest of two or more carriers in any manner whatsoever except as provided in Section 5 (2). Paragraph (a) thereof requires the approval of the Commission to the transaction; and paragraph (b) thereof requires a person seeking authority to engage in such a transaction to present an application to the Commission and gives the Commission power to approve it, if it finds that it is within the scope of paragraph (a) and will be consistent with the public interest. It seems obvious, therefore, that it will be unlawful for Union to enter into the proposed transaction unless it applies for and receives the Commission's approval; and it becomes the duty of the Commission to refuse to consider the proposed transaction unless Union joins in the application, for otherwise the Com-

mission's approval will countenance the participation of Union in the formation and management of the proposed consolidation contrary to the terms of the statute.

We are told that this construction of the statute involves the basic misconception that Section 5 (2) (a) is restrictive of the Commission's power when history shows that the section was intended to be permissive. This conclusion also is reached by centering attention upon this sub-section without sufficient consideration of the other statutory provisions. The fact is that the Commission's interpretation actually augments its power and authority. If its view is adopted neither the holding company nor the subsidiary may proceed without its approval. Moreover, if, as in this case, the interested person is not a carrier, and if he is authorized to acquire control of a carrier, he must thereafter, to the extent provided by the Commission, be considered a carrier and subject to certain carrier provisions which are enumerated in Section 5 (3) of the statute. Clearly the Commission's interpretation confers upon it a control of all the persons involved which is co-extensive with the merger or consolidation that is to be effected; and nothing else would effectuate the salutary purpose of Congress to permit consolidations of carriers that are economically desirable and at the same time to subject them to the authority of its appointed agent.

This interpretation of the statute depends upon the breadth to be given the term "control," as used in Section 5 (2) (a) of the Transportation Act of September 18, 1940, under which the Commission now operates. Fortunately the legislative history clearly indicates the meaning which Congress had in mind. The conference report on the Transportation Act of 1940, H. R. 2832, 76th Congress, 3d sess., p. 63, contains the following passage:

SECTION 2 (b). Definition of Control

This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of "control" which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term "person" is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1 (1) (a) and section 15 (4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase "controlling, controlled by, or

under common control with" a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp. v. United States* (307 U. S. 125, decided April 17, 1939).

Section 1 (3) (b) of the Act of 1940 heretofore quoted in the opinion of the court provides that control, as used in Section 5 and other sections, shall be construed to include actual as well as legal control whether exercised through circumstances surrounding organization or operation, through common directors, officers or stockholders, voting trusts, holding companies, "or through or by any other direct or indirect means." This language was used because, as the conference report shows, language of like breadth in Section 2 of the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. A. Section 152, (b), had been recently interpreted by the Supreme Court in *Rochester Corp. v. United States*, 307 U. S. 125, 145, where the court said:

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand.

The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The opinion of the Supreme Court also referred to House Report 1850, 73d Congress, 2d session, 4-5, which considered the proposal to make use of the terms "parent," "subsidiary," and "affiliated" in respect to the corporate relations of common carriers in the Communication Act of 1934. The report contained the following passage:

Many difficulties are involved in attempting to define such terms. It is believed that a more satisfactory result will be reached by referring to such persons as in the Senate bill and the amendment. No attempt is made to define "control" since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control, the intention is to include

actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors.

The intent of Congress to include within the purview of Section 5 (2) (a) all means by which control of a carrier may be acquired is further shown by contrasting the terms of that section with those of the corresponding section, to wit: Section 213 (a), of the Motor Carrier Act of August 9, 1935, 49 Stat. 543, 555. In the earlier statute the acquisition of control which subjected the transaction to regulation by the Commission was such as occurs in corporate consolidation or merger, or in purchase, lease or contract to operate carrier property, or in purchase of the stock of a corporate carrier. When the same subject was treated in Section 5. (2) (a) of the latter Act, Congress was careful to add the words "or otherwise" to the description of specific methods by which carrier control might be acquired. Clearly Congress desired to avoid the limitation

of control to that acquired through any particular method.

If these guides to the intention of Congress are observed, it seems impossible to give to the statute the literal and narrow construction for which the plaintiffs contend; and the prior reports of Division 4 of the Commission, in which this construction was adopted without contest, lose their significance. Keeping in mind that the test is actual rather than legal control, whether exercised directly or indirectly, it is futile to point out that the pending transaction contemplates the purchase of Marshall's property and its extinction as a corporate carrier. The reality is that Refiners will acquire the property and operating rights of Marshall, and thereupon, through the instrumentality of Refiners, Union will acquire control of another carrier. The same conclusion must be reached, if the purpose of Congress to subject motor carriers to the jurisdiction of the Commission is to be carried out, when Union, through its subsidiary, indirectly accomplishes the same result by the purchase of carrier property or by corporate merger or by other means. Under any other view, Union could expand its control over the motor carrier field indefinitely without itself submitting to the regulatory power of the Commission.

The pertinence of these observations to the peculiarities of the business of motor transport

with which the Commission is familiar is shown by the following passage from its final report:

There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute. As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities outstanding evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills, etc. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts,

and fuel, etc. It often is quite simple under these circumstances to acquire for cash the "assets" including certificate and good will, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of "control" as used in the Act.

The decision of the Commission should be sustained and the bill of complaint should be dismissed.

True copy.

Test:

(S) CHAS. W. ZIMMERMAN,

Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COASTAL TANK LINES, INC., ET AL., APPELLANTS

v.

MARSHALL TRANSPORT COMPANY, WARREN C. MARSHALL, REFINERS TRANSPORT TERMINAL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion (R. 54-73) of the specially constituted district court is reported in 52 F. Supp. 1010. The reports of Division 4 of the Interstate Commerce Commission (R. 8-25) and of the full Commission (R. 26-35) appear in 39 M. C. C. 93 and 39 M. C. C. 271, respectively.

JURISDICTION

The final decree of the specially constituted district court was entered on November 1, 1943

(R. 75). The petition for appeal was presented on December 17, 1943 (R. 76-77), and the appeal was allowed on the same day (R. 79). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of Part II of the Interstate Commerce Act, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted on January 31, 1944 (R. 86).

QUESTIONS PRESENTED

The ultimate issue involved is the validity of the Commission's order of September 2, 1943 (R. 35), dismissing an application made under Section 5 (2) (a) and (b) of Part I of the Interstate Commerce Act for authority to a common carrier by motor vehicle to purchase the property and operating rights of another carrier by motor vehicle. The vendor and vendee carriers were the applicants. The Commission found that the vendor carrier was controlled through stock ownership by a non-carrier corporation. Construing Section 5 (2) (a) and (b) as requiring an application to be made by the non-carrier controlling corporation, it dismissed the application for lack of power to approve the purchase.

Subordinate issues are:

1. Whether the acquisition of all the property of another carrier by a carrier which is controlled by a non-carrier constitutes an acquisition of control of such other carrier by the non-carrier, for which the Commission's approval is required under Section 5 (2) (a) of the Interstate Commerce Act.

2. If so, whether the Commission properly held that it could not consider the validity of the transaction, in the absence of an application by the non-carrier company, under Section 5 (2) (b), for authority to acquire control.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 49-58.

STATEMENT

By joint application, appellees Refiners Transport & Terminal Corporation (hereinafter called "Refiners") and Marshall Transport Co., Inc. (hereinafter called Marshall), both common carriers by tank truck,¹ sought authority from the Interstate Commerce Commission under the provisions of Section 5 (2) (a) of Part I of the Interstate

¹ Refiners carries petroleum, petroleum products, and certain other liquids in various midwestern states and also in Pennsylvania and West Virginia (R. 9). Marshall holds a certificate of public convenience and necessity to carry petroleum products over irregular routes from Baltimore, Maryland, to points in Delaware, Pennsylvania, and the Washington, D. C., commercial zone (R. 10).

4
Commerce Act for the former to purchase the property and operating rights of the latter. The proposed purchase also included certain automotive equipment and terminal properties of appellee Warren C. Marshall used by Marshall in the conduct of its operations. (R. 8, 10). Warren C. Marshall is president of Marshall and the owner of all its outstanding capital stock except two qualifying shares (R. 10).

A hearing was held upon the application at which nine motor carriers, now co-appellants, opposed the application. The Antitrust Division of the Department of Justice also intervened in opposition. Briefs were subsequently filed, an examiner's proposed report was issued to which exceptions were filed by the protestants, and the matter was argued before the Commission, Division 4. (R. 8-9.) On April 5, 1943, the Commission, Division 4, issued its report (R. 8-25) finding that the purchase by Refiners of the operating rights and property of Marshall, upon the terms and conditions set forth, was a transaction within the scope of Section 5 (2) (a) of Part I of the Interstate Commerce Act, and would be consistent with the public interest (R. 21-22). In thus deciding the application upon the merits, Division 4 overruled certain contentions of the protestants. Among these was the contention that this transaction would also result in the acquisition of control over Marshall by Union Tank

Car Company (hereinafter called Union), the non-carrier corporate parent of Refiners, within the meaning of Section 5 (2) (a) and that Union therefore was a necessary applicant for control authority under that Section.

With respect to the relationship between Union and Refiners, Division 4 found as follows (R. 14-15):

Refiners' organization.—Refiners is the result of consolidation of the properties of an intrastate motor carrier and a motor carrier operating in interstate and intrastate commerce as more particularly described in Refiners Transport & Term. Corp.—Stock, 36 M. C. C. 789, transfer of the interstate operating rights involved having been approved under section 212 (b) in the proceedings shown in footnote 3 [R. 9]. It controls, through ownership of capital stock, Petroleum Haulers, Inc., an Indiana corporation engaged solely in intrastate transportation by motor vehicle in Ohio and in Indiana, and Union Transport Corporation, a nonoperating company. Refiners, in turn, is controlled through ownership of 82.6 per cent of its outstanding common capital stock, par value \$10 per share, by Union Tank Car Company, herein called Union, whose outstanding capital stock, consisting of 1,080,298 shares as of October 13, 1942, is distributed among approximately 5,000 shareholders. Approximately 33.4 per cent of such outstand-

ing capital stock is owned by 10 stockholders, the largest block (approximately 22 per cent of the total outstanding) being held by the Rockefeller Foundation, of New York, N. Y. No stock is owned by a rail or water carrier, and only 100 shares thereof are owned by a motor carrier [Motor Express, Inc.]. It has no stock interest in any other carrier. It is one of the larger owners of rail tank cars and is engaged in the business of leasing such equipment to shippers under standard car service agreements providing for rental payments on a per diem basis, and receives certain allowances (one and one-half or two and one-half cents per mile depending on the type of car) from railroads as provided under the latter's tariff (Agent B. T. Jones, I. C. C. No. 3619), now on file with this Commission. It does not manufacture tank-car equipment commercially but does maintain extensive repair facilities throughout the country to service its own equipment. However, while in transit the railroads make minor repairs on the cars at charges provided for in a Master Car Builders Agreement to which Union is a party. Approximately 98 per cent of the equipment leased is used by petroleum producers and distributors, but this is changing rapidly due to prevailing war conditions. It has seven officers, who are also its directors, only one, B. C. Graves, being also one of the five directors of Refiners. He is not an officer

of the latter. With the above exception, none of its directors has an interest in any other carrier either as an officer, director, or through stock ownership, and it is against the policy of the company for its directors to hold offices in other companies.

Between 70 and 75 percent of its outstanding stock is usually voted under proxies held by its president and two vice presidents.²

Upon petitions for reconsideration, the matter was submitted to the entire Commission (R. 26, 27). By report (R. 26-35) of August 3, 1943, the Commission reversed the holding of Division 4 with respect to the application of Section 5 (2) (a). It concluded (R. 31) that the proposed transaction was one wherein a person not a carrier, already controlling one carrier, Refiners, sought to acquire control, within the meaning of Section 5 (2) (a), of another carrier, Marshall. The Commission further held that under Section 5 (2) (b) this could not be done without an application for authority to do so having been filed with it by Union, the party in interest (R. 31, 32). Commissioners Porter and Miller, who had constituted the majority of Division 4, dissented (R. 32-35). In reaching its conclusion, the Commission incorporated and adopted (R. 27-28) the factual findings of Division 4 as quoted above.

² Division 4 also held that Union is not "affiliated" with a railroad within the meaning of the proviso of Section 5 (2) (b), and that it is not a carrier by railroad (R. 20).

An order of dismissal was deferred for twenty days in order to afford an opportunity for Union to comply with the conclusion reached (R. 32). Union having failed to act within the period set, the Commission entered an order on September 2, 1943, dismissing the application (R. 35).

On or about September 10, 1943, the applicants before the Commission instituted suit in the United States District Court for the District of Maryland to set aside the order of dismissal (R. 1). The Interstate Commerce Commission and the several motor carrier protestants intervened (R. 38, 40). Final hearing was held before a specially constituted three-judge court on November 20, 1943.

The single issue before the district court was whether the Commission was authorized under Section 5 (2) (a) and (b) to refuse to hear and dispose of, on the merits, the application of Refiners and Marshall without the joinder of Union in the application (R. 60).

By opinion (R. 54-68) of District Judge Chesnut, filed October 16, 1943, a majority of the statutory court held that the non-carrier control clause of Section 5 (2) (a) was not applicable to the purchase by a non-carrier company's carrier subsidiary, of the property and operating rights of another carrier so as to disable the Commission from hearing and determining upon the merits the subsidiary's application for authority to pur-

chase without the formal joinder of the controlling corporation. In a dissenting opinion (R. 68-73), Circuit Judge Soper held that the Commission had properly construed the statute and that the joinder of the controlling corporation was a necessary condition to the grant of the authority sought.

The final decree, together with findings of fact and conclusions of law, was entered on November 1, 1943, annulling and setting aside the Commission's order of September 2, 1943, and directing the Commission to act upon the merits of the application (R. 74-76).

SPECIFICATIONS OF ERRORS TO BE URGED

The district court erred:

1. In holding that the conclusion reached by the Commission as to its authority and jurisdiction under Section 5 (2) (a) of Part I of the Interstate Commerce Act is not in accord with the intention of the statute to be gathered from its plain wording and from its historical development.

2. In holding that the "non-carrier control clause" of Section 5 (2) (a) is not restrictive of the Commission's authority to act under the "carrier purchase clause" of Section 5 (2) (a).

3. In holding that the application in this case was in fact made by the real party in interest within the statutory sense.

4. In holding that the Commission has authority to hear the application of Refiners and Trans-

port on the merits without the formal joinder of Union in the application.

5. In enjoining the dismissal order of the Commission of September 2, 1943, and enforcing by writ of mandatory injunction the Commission's jurisdiction of said application as filed with the Commission and directing the Commission to proceed to final disposition thereof on the merits.

6. In failing to dismiss the complaint.

SUMMARY OF ARGUMENT

I

Having found that Union, a non-carrier, controlled Refiners, a common carrier by motor vehicle, the Commission properly held that the attempted purchase by the subsidiary carrier of the property and rights of Marshall was within the purview of Section 5 (2) (a) as an acquisition by "a person which is not a carrier and which has control of one or more carriers" of the "control of another carrier through ownership of its stock or otherwise."

Section 5 (2) (a) must be construed in the light of its context. It is apparent from a consideration of this paragraph of Section 5 and Section 5 as a whole that the word "control" wherever used is to be accorded the broadest scope possible. This is demonstrated by the broad definition of control in Section 1 (3) (b) where it is provided that "control" shall be construed to

mean "actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation * * * or through or by any other direct or indirect means." Also, paragraph (4) of Section 5, which paragraph complements paragraph (2) (a) thereof, forbids, except in the manner provided, the accomplishing or effectuating of "the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly * * * or in any other manner whatsoever." If, as seems plain, the acquisition by Union of Marshall through the instrumentality of its own creature will accomplish a control of the two carriers in a common interest within this broad language, the enabling provisions of paragraph (2) (a) should be given the application suggested by the Commission.

Such a construction is necessary to give effect to the purpose of Congress to subject non-carrier holding companies to certain provisions of the Act relating to carriers' reports, accounting, inspection of records, and the issuance of securities. Paragraph (3) of Section 5 makes non-carrier holding companies, to the extent provided by the Commission's order approving a carrier acquisition, subject to these provisions of the Act. This legislative requirement rests upon the public interest in the maintenance and preservation of an

adequate transportation system and the ability of the Commission to administer the Act to that end. Since the Commission is given discretion to determine the extent to which the requirements of the Act shall apply to holding companies, it seems logical that a similar latitude, within statutory limits, should be accorded the Commission in determining what companies have acquired "control." In this exercise of discretion, the form of control should not limit the Commission's powers. Where a holding company (Union) has in fact acquired control of a carrier (Marshall), an intent should not be attributed to Congress to exempt the holding company which acts through its carrier subsidiary (Refiners) in the purchase of another carrier (Marshall), while holding it subject to the special provisions of the Act if it should make the purchase itself.

The characteristics of the industry do not lend themselves to a construction of paragraph 2 (a) of Section 5 as being confined to forms of corporate control. Many motor carriers are owned by individuals or partnerships, control of which can only be passed by sale. Even when incorporated, the financial structures of such carriers are often quite simple and their stock closely held, thus making it more convenient to acquire property and operating rights by purchase rather than through stock ownership. Congress must be assumed to have taken into account these existing conditions when legislating.

The historical development of Section 5 supports the Commission's interpretation of paragraph (2) (a) thereof. The Transportation Act of 1920 inaugurated a new policy in railroad regulation. New provisions were thereby incorporated in the Interstate Commerce Act which had as their objective the fostering, developing and maintaining of efficient and adequate transportation service. Among them was the provision (sec. 5) for the approval by the Commission of the acquisition of control of one rail carrier by another where a consolidation into a single system for ownership and management was not involved. The Emergency Railroad Transportation Act of 1933 expanded this provision to include holding companies as such, and made such non-carriers subject to a prescribed regulatory control. The Motor Carrier Act of 1935 applied the same controls to motor carriers and to non-carriers where control was evidenced by stock ownership alone. Subsequently, the Transportation Act of 1940 enlarged the application of the statutory requirements with respect to acquisitions of control by non-carriers by defining control as used in Section 5 and adding the words "or otherwise" to the non-carrier control clause of paragraph (2) (a) thereof. The purpose of these additions was to make the determination of what constitutes an acquisition of control an administrative question. This affirmatively appears in the conference report on the

Transportation Act of 1940 where it was pointed out that the definition of control in Section 1 (3) (b) was made to accord with this Court's decision in *Rochester Telephone Corp. v. United States*, 307 U. S. 125. In that case, it was held that the term "control" in the Federal Communications Act did not depend upon artificial tests and that the Commission's finding of control had administrative finality.

The district court's interpretation of the statute does not conform with the historical expansion of the Act and its over-all policy. It overlooks the public interest inherent in the adequacy of transportation service and rests upon the narrow base of corporate relationship.

II

Since the transaction here in issue was within the purview of the non-carrier control clause of paragraph (2) (a) of Section 5, the Commission could not give it validity without an appropriate application by the non-carrier controlling company.

While the language of Section 5 (2) (a) considered alone suggests permissive transactions, paragraph (4) of Section 5 specifically declares it to be unlawful for any person "to enter into any transaction within the scope of subparagraph (a)" without the Commission's approval. It does not suffice to say, as did the court below, that the re-

strictive effect of paragraph (4) expressly excepts those transactions authorized by paragraph (2) (a). If the present transaction falls within the non-carrier control clause (as well as the carrier purchase clause of paragraph 2 (a)), it never becomes a transaction which has received paragraph (2) approval unless the non-carrier makes an appropriate application to the Commission under paragraph 2 (b).

The development of the statute with respect to the consolidation of carriers confirms the mandatory effect of the present provisions of Section 5. While the Transportation Act of 1920 authorized the Commission to approve acquisitions of control, and consolidations and mergers, no prohibitory provisions comparable to paragraph (4) of Section 5 were enacted. Congress did not expressly provide that it would be unlawful for any person to effectuate a common control or management without the Commission's approval, until it passed the Transportation Act of 1933. However, it appeared in the House Report on the bill which was enacted as the 1933 Act, that the Commission's approval was to be a condition precedent to the legality of any transaction involving consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control. The Motor Carrier Act of 1935 enacted similar provisions with respect to motor carriers and in the enabling

provisions of Section 213 (a) significantly provided that the described transactions would be lawful upon the Commission's approval "but under no other conditions." The Transportation Act of 1940 consolidated in Section 5 provisions applicable in common to rail, motor and water carriers but continued in effect, with the amendments above adverted to, the enabling and prohibitory provisions with respect to consolidations, mergers, purchase, leases and acquisitions of control, and thus confirmed the mandatory character of proceeding under Section 5 (2).

ARGUMENT

I

THE COMMISSION CORRECTLY HELD THAT THE PHRASE "TO ACQUIRE CONTROL OF ANOTHER CARRIER THROUGH OWNERSHIP OF ITS STOCK OR OTHERWISE," AS EMPLOYED IN SECTION 5 (2) (a) OF PART I OF THE INTERSTATE COMMERCE ACT, INCLUDES THE PURCHASE OF THE PROPERTY AND OPERATING RIGHTS OF ANOTHER CARRIER

A. THE LANGUAGE EMPLOYED BY CONGRESS IN THE ENACTMENT OF SECTION 5 OF THE INTERSTATE COMMERCE ACT CLEARLY SHOWS THAT THE WORD "CONTROL" AS USED IN SECTION 5 (2) (a) IS TO BE READ IN A COMPREHENSIVE SENSE

Section 5 (2) (a) of Part I of the Interstate Commerce Act makes it lawful, with the approval and authorization of the Interstate Commerce Commission as provided in Section 5 (2) (b):

for any carrier * * * to purchase
* * * the properties, or any part there-

of, of another; * * * or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

Section 5 (2) (b) provides that whenever a transaction is proposed under subparagraph (a), the carriers or persons seeking authority therefor "shall present an application to the Commission."

The issue here turns, as it did before the Commission and the court below, upon the construction of the "non-carrier control" clause of Section 5 (2) (a).³ In applying the statute to the application before it, the Commission held that Union, which concededly controls Refiners in the statutory sense, was attempting to acquire control of a second motor carrier, Marshall, through purchase by its subsidiary Refiners of Marshall's

³ Section 5, as amended by the Transportation Act of 1940, deals with "Combinations or Consolidations of Carriers" and, under Section 5 (13), is applicable to all types of carriers with which Parts I, II, and III of the Interstate Commerce Act deal. In paragraph (2) (a) of Section 5, five transactions are named which are made lawful with the approval and authorization of the Commission. Among them are, (a) the purchase by one carrier of the properties of another, and (b) the acquisition of control of another carrier through ownership of its stock or otherwise by a non-carrier which has control of one or more carriers. These will be referred to as the "carrier purchase" clause and "non-carrier control" clause.

property and operating rights* and that the transaction fell within the phrase "or otherwise", as found in subparagraph (a), *supra*. This interpretation finds support in a consideration of the compass of Section 5, which discloses the manifest desire of Congress to accord the word "control" wherever used the broadest scope possible.

Appellants* do not assert, as the district court seemed to think (R. 61), that the non-carrier control clause of Section 5 (2) (a) must be construed as superseding the express authority granted to the Commission in the carrier purchase clause, but only that this same transaction falls within both clauses.

*Other proceedings involving acquisitions by Refiners of the property and operating rights of other carriers are:

Docket No.	Title	Status
MC-F-1951.....	Refiners Transport & Terminal Corporation—Purchase—Leander G. Tait.	Awaiting outcome of litigation involving R-1936.
MC-F-2034.....	Refiners Transport & Terminal Corporation—Control—The Collins Transportation Co., Inc.	Dismissed on petition 12/18/43.
MC-F-2059.....	Refiners Transport & Terminal Corporation—Merger—The Collins Transportation Co., Inc.	Dismissed on petition 12/18/43.
MC-F-2100.....	Refiners Transport & Terminal Corporation—Motor Fuels Transport, Inc.	Dismissed on petition 12/22/43.
MC-F-2128.....	Refiners Transport & Terminal Corporation—Purchase—W. T. Holt, Incorporated, and W. T. Holt.	Awaiting outcome of litigation involving E-1936.

*The term "appellants," as herein used, refers to the United States and the Interstate Commerce Commission.

Viewed solely in this light, as a question of whether this transaction falls within the non-carrier control clause, there is presented no problem of disregarding the corporate entity, or determining whether Refiners in making this purchase was acting as the *alter ego* of Union.* For such purposes, it is immaterial whether Union or Refiners is to be regarded as the party actually purchasing the property of Marshall, or that the property was purchased here by Union's subsidiary, Refiners, rather than directly by Union. If such purchase amounts to an acquisition of control of Marshall, as we submit it does, the ultimate result will be that Union will control Marshall just as if it had made the purchase directly, since it controls Refiners, and thus everything which Refiners controls. The fact that the property purchase here was not by Union directly is of no more significance in determining whether Union gained control than it would have been in the case of a stock purchase by Union's subsidiary. Plainly, if a stock purchase had been involved, it could not be questioned that Union would have

* Certain of the private appellants argued, *inter alia*, before the Commission and district court that, irrespective of whether this transaction fell within this statutory control clause, Refiners, in making this purchase, was merely acting as the *alter ego* of Union, the real party in interest. It was further argued that the Commission, as an incident of its general power over its procedure (sec. 204 (a) (6)), might compel such a party to file an application and appear before it.

secured control of Marshall whether Union purchased Marshall's stock directly, or through its corporate subsidiary, Refiners.

The broad language of the Interstate Commerce Act, as amended by the Transportation Act of 1940, clearly justifies the construction that control, as there understood, of a carrier can be accomplished through means other than acquisition of its stock, including acquisition of its property. In the first place, Section 5 (2) (a) refers to acquisition of "control of another carrier through ownership of its stock *or otherwise*" [italics supplied]. Similar sweeping language is contained in Section 1 (3) (b) of the Act which provides:

For the purpose of section[s] 5 * * * of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, *or through or by any other direct or indirect means; and to include the power to exercise control* [italics supplied].

Complementing the provisions of Section 5 (2) (a) are those of paragraph 4 of Section 5, which declare it to be unlawful for any person to enter

into any transaction within the scope of subparagraph (a) of Section 5 (2), except as provided in paragraph (2), and which prohibit any person from accomplishing or effectuating, or participating in accomplishing or effectuating "the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever" [italics supplied]. The words "control or management" are defined in paragraph (4) to include "the power to exercise control or management." It is difficult to imagine statutory language of wider import in defining "control" than here employed. A control that is obtained "in any manner whatsoever," "however such result is attained, whether directly or indirectly," "whether actual or legal," or whether active or potential, is a control forbidden unless the statu-

It should be noted that the language used in Sections 5 (2) (a), 1 (3) (b) and 5 (4), as the Commission observed (R. 29), is much broader than that contained in Section 7 of the Clayton Act (15 U. S. C. 18), which this Court in *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 561, had construed as not covering control through acquisition of property. That Section provides in part:

* * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, * * *

tory requirements are satisfied. Here, through purchase by Refiners of Marshall's properties and rights, those two carriers are to be made one and placed under a single management and control. Union, as the holding company of Refiners, would thereby acquire direct control of the activities of Marshall as an integral part of a consolidated company. Plainly, it was intended that the reach of the enabling provisions dealing with non-carrier control (sec. 5 (2) (a) and (b)) should be treated as coextensive with the prohibitory provisions of paragraph 4.

The legislative design of the non-carrier control clause of paragraph (2) of Section 5 is disclosed in paragraph (3) thereof. It is there provided that where a non-carrier is authorized by an order entered under paragraph (2) to control any carrier or two or more carriers, such non-carrier, to the extent provided by the Commission in its order, shall be considered as a carrier subject to provisions (sec. 20, 20 (a)) of the Act dealing with annual and special reports, uniform systems of accounts, access of the Commission's representatives to records, and the issuance of securities and assumption of liabilities by carriers.* It should be noted that the Commission is given discretion in determining the extent to which

* As applied to carriers by motor vehicle, these provisions are to be found in Section 204 (a) (1) and (2), Section 220, and Section 214, Appendix, *infra*, pp. 55-58.

these specified provisions are to be applied to the non-carrier company.*

The powers given the Commission over the records and accounts and the issuance of securities of carriers, have behind them the public interest in the maintenance and preservation of adequate transportation systems and the ability of the Commission to administer the Act to that end. *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423; *Goodrich Transit Co. v. Interstate Commerce Commission*, 224 U. S. 194; *Pittsburgh & W. V. Ry. Co. v. Interstate Commerce Commission*, 293 Fed. 1001 (App. D. C.), appeal dismissed, 266 U. S. 640. But the extent to which these restrictions shall be imposed upon non-carrier holding companies has been left to the Commission's determination. Having given the Commission this latitude of action, it is reasonable to assume that Congress meant that it should be exercised whatever might be the form of "control."

No one can gainsay that, as the Commission stated, "there can be no more direct or positive manner of obtaining control than by outright purchase" (R. 30). If such type of control is acquired, the broad definition of control (sec. 1 (3)

* Section 214 may be an exception. Considered alone, it seems to make mandatory the necessity for the Commission's approval of the issuance of securities or the assumption of indebtedness.

(b)), coupled with the discretion vested in the Commission to render the holding company amenable to the special limitations, obviously sustains the Commission's action.¹⁰ It would be incongruous to attribute to Congress an intent to exempt the holding company which acts through its carrier subsidiary in the purchase of another car-

¹⁰ The characteristics of the industry support the practicality of this interpretation. As the Commission pointed out (R. 30):

• • • As a matter of fact, acquisition of control of many motor carriers could be obtained only by purchase of the properties because many motor carriers are owned by individuals alone or by partnerships. Such individuals and partnerships often possess extensive operating rights. It further is to be noted that the financial and business structures of many motor carriers are quite simple even when incorporated. Their stock usually is closely held, and they rarely have securities outstanding evidencing long-term debt. Their terminals in many instances are rented; their equipment if not fully paid for is covered by some form of a purchase money contract; their other assets often consist of a relatively small amount of furniture, some spare tires and parts, together with accounts "receivable" representing outstanding freight bills, etc. Their "liabilities" often consist principally of unpaid equipment balances, bills for tires, parts, and fuel, etc. It is often quite simple under these circumstances to acquire for cash the "assets," including certificate and goodwill, and to assume or pay the "liabilities," and to liquidate the concern. Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of "control" as used in the Act.

rier, while holding it subject to the special provisions of the Act whenever making the purchase directly.

The enactment of the Motor Carrier Act of 1935 was preceded by exhaustive studies of the motor carrier industry. Subsequent amendments, including the addition of the words "or otherwise" to the noncarrier control clause of Section 5 (2) (a), by the Transportation Act of 1940, must be taken to have resulted from practical experience in regulation and to have been designed to facilitate the objectives of the Act as exemplified in the declaration of policy (Appendix, *infra*, p. 49). The inherent characteristics of the industry being known to Congress, it must be assumed that the wording of Section 5 was chosen to fit conditions as they existed.

It should be remembered, too, that Congress has not authorized the Commission in passing upon a proposed merger under Section 5 to ignore the policy of the antitrust laws. *McLean Trucking Co., Inc., v. United States*, No. 31, this Term, decided January 17, 1944, pamphlet, p. 14. Thus, it is appropriate, in construing Section 5, to note that the courts have never drawn any distinction, when considering the validity of an alleged monopoly under the Sherman Act, as to whether the offending corporation acquired control of its competitors through purchase of their stock or through purchase of their assets. See, *e. g.*,

United States v. American Tobacco Co., 221 U. S. 106, 158-163; *United States v. Pullman Co.*, 50 F. Supp. 123, 126 (E. D. Pa.)."

It is idle to assert, as appellees no doubt will, that because Marshall will cease its operations and cease to be a carrier after this transaction is completed, Union cannot be said to be acquiring control of "another carrier" within the meaning of Section 5 (2) (a). This unduly legalistic argument overlooks the fact that the Act is concerned primarily with whether the company to be acquired is a carrier at the time the transaction is proposed, not with whether it will be technically a carrier when the transaction has been carried to fruition. This is manifested by the requirement that the Commission's approval be given before the transaction is carried out. Moreover, appellees' same argument would apply equally if the present transaction is considered merely a purchase of Marshall's property by Refiners under the first (carrier purchase) clause of Section 5 (2) (a). The fact that Marshall would

¹¹ This Court remarked in *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554, 561, that—

If purchase of property has produced an unlawful status a remedy is provided through the courts. *Sherman Act*, c. 647, 26 Stat. 209; * * *

cease to be a carrier after all its property and operating rights had been sold would be just as fatal, under appellees' theory, to the Commission's jurisdiction under the first clause since that clause applies only to purchases of the "properties, or any part thereof, *of another [carrier]*" [italics supplied]. Nevertheless, appellees do not question the Commission's jurisdiction over this transaction if viewed merely as a carrier's purchase of property.

The district court thought that the statute was aimed mainly at preventing unfair domination and management of one carrier for the advantage of another, and that such a condition could exist only when there are two going carriers (R. 65-66, 68). This purpose was said to be manifest in paragraph (6) of Section 5 of the Act (R. 65). But that paragraph contains merely a definition of a "person affiliated with a carrier" and provides that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier * * * it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." It does not purport to define "control." While the purpose mentioned is un-

doubtedly one of the purposes of Section 5, it is scarcely the only one or even the main one. Rather, from the breadth of the transactions enumerated in Section 5 (2) (a), and from the fact that Section 5 (11) exempts persons participating in those transactions approved by the Commission from the prohibitions of the anti-trust laws, it is evident that Congress sought to subject all transactions having a tendency to promote concentration of economic power in the transportation field to the approval of the Commission. In the light of this broad purpose, considerations of substance must be valued over those of form, and the fact that Marshall will cease to be a carrier after this transaction is completed cannot be regarded as of any crucial significance.

**B. THE HISTORICAL DEVELOPMENT OF SECTION 5 CONFIRMS THE
CORRECTNESS OF THE COMMISSION'S INTERPRETATION**

The historical development of the provisions of the Interstate Commerce Act dealing with various forms of acquisition of control over carriers indicates a constantly broadening concept of "control," and, as the district court admitted (R. 65), a "consistent progressive congressional policy in broadening the authority of the Commission to deal with various types of cases involving control."

The new policy for transportation regulation inaugurated in the 1920 Act (*New England Divisions Case*, 261 U. S. 184, 189) was designed in order further to assure adequacy in transportation service. *United States v. Lowden*, 308 U. S. 225, 230; *N. Y. Central Securities Co. v. United States*, 287 U. S. 12, 24. This emphasis took a wide range. Among the new provisions were those placing new securities under the control of the Commission; the provision for the consolidation of railroads into a limited number of systems; and provisions for securing adequate car service and giving the Commission control over the extension and abandonment of railway lines. All of these provisions spoke in terms of service.

Section 5 of the 1887 Act, as amended by the 1920 Act (41 Stat. 456, 480-482), gave the Commission authority to approve the acquisition of control by one carrier over another carrier "either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation," where the Commission found that such transactions would be in the public interest. Section 5 also relieved carriers from liability under the antitrust laws in carrying out

such acquisitions of control, where the Commission had approved the transaction. But the Commission's authority, as defined in the statute, was made applicable only to acquisitions by carriers. When, therefore, non-carrier holding companies were utilized for the unification of carrier properties, the Commission found itself without jurisdiction.¹² Widespread use of the railroad holding company device and need for its regulation led to the amendments made in Section 5 by the Emergency Railroad Transportation Act of 1933¹³ (48 Stat. 211, 217-220). Section 5 (4), as amended by that Act, made it lawful with the Commission's approval, for a corporation which was not a carrier and which had control of a carrier to acquire control of another carrier through ownership of its stock. Congress, however, having legitimized (sec. 5 (4)) this method of securing control, made it unlawful¹⁴ to accomplish control or management in a common interest of any two or more carriers by various other named devices or "in any other manner whatsoever" (sec. 5 (6)), as amended.¹⁵ By Section

¹² *Stock of Denver & Rio Grande Western R.R.*, 70 I. C. C. 102, 105; see Sharfman, *The Interstate Commerce Commission* (1935), Vol. III A, p. 439.

¹³ See Sharfman, *op. cit.*, 439-442; H. Rep. No. 193, 73rd Cong., 1st sess., pp. 19-20; see also Annual Report of the Interstate Commerce Commission, 1932, p. 25.

¹⁴ Formerly, the only possible barrier to acquisition of control was the antitrust laws. See, e. g., *Northern Securities Co. v. United States*, 193 U. S. 197.

¹⁵ See S. Rep. No. 87, 73rd Cong., 1st sess., p. 9.

5 (5); the Commission was also authorized, when approving the acquisition of control of carriers by non-carriers, to subject the non-carriers, just as if carriers, to certain regulatory provisions of the Act relating to reports, accounts, and the issuance of securities. The 1933 Act, furthermore, amended Section 5 in order to require approval by the Commission of purchases of the property of one carrier by another carrier (sec. 5 (4)).¹⁴ Substantially these same provisions were carried over with respect to acquisitions of control of motor carriers into Section 213 of the Motor Carrier Act of 1935 (49 Stat. 543, 555-557). Again, with the Commission's approval, non-carriers controlling a carrier were permitted to acquire control of another carrier "through ownership of its stock."

To this point, only the acquisition of control by non-carriers through stock purchase was legalized, when accomplished with the Commission's approval. But the Transportation Act of 1940 (54 Stat. 898), besides combining the provisions dealing with acquisition of control of all types of carriers in a new Section 5, completely removed the restrictions as to the types of acquisition of

¹⁴ Previously, the Commission had taken the view that its approval of the purchase of the property of one carrier by another carrier was required only under Section 1 (18), which necessitates a certificate of public convenience and necessity. *Acquisition by Pittsburgh & W. Va. Ry. Co.*, 150 I. C. C. 81, 84; Sharfman, *op. cit.*, 445-446.

control which could lawfully be accomplished with the Commission's approval. In the first place, Section 5 (2) (a) was amended by adding the phrase "or otherwise," thereby making that Section read:

It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock *or otherwise* [italics supplied].

Congress clearly intended this language to mean just what it says and to give the Commission authority to approve all methods of securing control, even by methods other than stock ownership. Thus, the conference report says of this change, which was made in conference (H. Rep. No. 2832, 76th Cong., 3rd sess., p. 68):

1. Paragraph (2) is changed by adding the words "or otherwise" in several places, so that acquisitions of control by methods other than through ownership of stock is authorized with Commission approval.

The addition of Section 1 (3) (b) by the Transportation Act of 1940 also clearly indicates the Congressional intent to include within the purview of Section 5 (2) (a) all means by which control of a carrier may be acquired. Section 1 (3) (b), heretofore quoted (*supra*, p. 20), provides that

control, as used in Section 5 and other Sections, shall be construed to include actual as well as legal control, whether exercised through circumstances surrounding organization or operation, through common directors, officers or stockholders, voting trusts, holding companies, "or through or by any other direct or indirect means." As Circuit Judge Soper indicated in his dissenting opinion (R. 71), the conference report "shows that Congress used this broad language advisedly, mindful of the broad interpretation which had but

" H. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63, states:

Section 2 (b). Definition of Control:

This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of "control" which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term "person" is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1 (1) (a) and section 15 (4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase "controlling, controlled by, or under common control with" a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp. v. United States* (307 U. S. 125, decided April 17, 1939).

recently been placed by this Court in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, upon the definition of control in Section 2 of the Communications Act of 1934 (48 Stat. 1064, 47 U. S. C. 152 (b)). There, this Court had said (307 U. S. 125, 145-146):

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-287; *Swayne &*

Hoyt, Ltd., v. United States, 300 U. S. 297, 303, *et seq.*¹⁶

The Commission in the instant case has found that Union was, through its subsidiary carrier, Refiners, attempting to acquire control of another carrier, Marshall. The method adopted to effectuate that purpose would ultimately result in the extinction as a legal entity of Marshall, the carrier to be purchased. But the service heretofore rendered by Marshall would be continued by Refiners and would in turn be subject to the control of Union. The Commission held this scheme to be the acquisition of control within the statutory language. In so doing, it was not exercising a mere fact-finding function but was acting as the duly constituted expert body called

¹⁶ In support of its conclusion that Congress did not have in mind artificial tests of control, the Court (307 U. S. 125, 145) cited H. Rep. No. 1850, 73rd Cong., 2nd sess., pp. 4-5, where it was said:

* * * No attempt is made to define "control," since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation; either by the ownership of such stock alone or through such ownership in combination with other factors.

upon by Congress to give full implementation to the carrying out of the National Transportation Policy. See *Gray v. Powell*, 314 U. S. 402, 412; *Helvering v. Clifford*, 309 U. S. 331, 336; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145. The question of what constitutes control within the meaning of Section 5 (2) (a) is, of course, a matter for determination by the administrative body whose conclusion must be sustained when it rests upon a rational basis. *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, 287.

The court below stated (R. 65) that the construction of the statute adopted by the Commission is not necessary in the public interest in the regulation of carriers. Aside from overstepping its function in such a declaration, the court has taken too narrow a perspective of the purpose of Section 5 in general and paragraph (2) (a) thereof in particular. It is not enough to say that the main purpose of the statute was to prevent unfair domination and management of one carrier for the advantage of another, and, therefore, when the application is made by a subsidiary of a non-carrier for authority to purchase another carrier, that the Commission by imposing conditions can preserve the integrity and efficiency of the separate carriers to the extent necessary for the public interest. The public interest goes beyond the interests of the investors in the par-

ticular carriers involved. Conceivably, a proposed purchase may result in more expeditious and efficient service and savings that may make rate reductions possible, and, at the same time, destroy what theretofore has been competitive transportation services. In such a case, the Commission would be faced, under the lower court's construction, with the dilemma of having to deny to the public the benefits arising from the fusion of the two companies or of authorizing the merger under a common control upon which it could not impose the statutory restraints which Congress deemed necessary where a non-carrier controls the service of two legally separate carriers. It is thus readily apparent that the need for the regulation of the non-carrier holding company, as Congress declared (see pp. 30-31, *supra*), does not vary in accordance with the particular method by which control is obtained.

II

SINCE THE TRANSACTION WAS WITHIN THE PURVIEW OF THE NON-CARRIER CONTROL CLAUSE OF SECTION 5 (2) (a), THE COMMISSION PROPERLY HELD THAT IT COULD NOT PROCEED TO CONSIDER ITS VALIDITY IN THE ABSENCE OF AN APPROPRIATE APPLICATION BY THE NON-CARRIER

The court below construed Section 5 (2) (a) as authorizing the Commission to act in any one of several permissive situations (R. 62). It held that the provision for the purchase by one car-

rier of the property and operating rights of another was independent of the non-carrier control clause, so as to compel a decision on the merits by the Commission upon the application of merely the carrier (R. 62). This conclusion, we submit, cannot be sustained, for it was reached by erroneously focusing attention merely upon paragraph 2 (a) of Section 5 to the exclusion of the language of other paragraphs of that Section. These other paragraphs, read in their historical setting, make it abundantly clear that as to any transaction within the ambit of the non-carrier control clause of Section 5 (2) (a), the securing of the Commission's approval upon the application of the non-carrier is mandatory rather than permissive.

Section 5 (2) (a) provides that it shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b), for the described transactions to be accomplished. But paragraph (4) conversely declares it to be unlawful for any person "to enter into any transaction within the scope of subparagraph (a)" of paragraph 2 except as provided in paragraph (2). Paragraph (2) (b) provides that "whenever a transaction is proposed under subparagraph (a), the carrier or carriers *or person seeking authority therefor shall present an application to the Commission*" [italics supplied]. Thus, while subparagraph 2 (a) alone is couched in permissive language, the subsequent paragraphs negative the

legality of any of the transactions there specified which have not been approved by the Commission in accordance with the procedure prescribed in Section 5 (2) (b). And one of the requirements of that procedure is that the person seeking authority shall present an application.

The court below sought to dismiss the restrictive effect of Section 5 (4) by stating (R. 62) that paragraph 4 expressly excepts from transactions there made unlawful, those authorized under Section 5 (2) (a). But this statement ignores the fact that participation in transactions within the scope of Section 5 (2) (a) is excepted from illegality under Section 5 (4) only as provided in Section 5 (2). Section 5 (2), of course, also embraces Section 5 (2) (b), where the proper procedure is prescribed, and, as above stated, under this procedure the person seeking authority must file an application. Thus, if the present transaction falls within the non-carrier control clause (as well as the carrier purchase clause) of Section 5 (2) (a), then Union could not, by virtue of Section 5 (4), lawfully participate therein without securing the Commission's approval in the method set forth in Section 5 (2) (b). Union would clearly be a "person seeking authority therefor" within the meaning of Section 5 (2) (b), and by that Section would be required to present its application. For the Commission to have approved this transaction without Union's

application being on file, would have been to countenance Union's participation in a transaction in derogation of the statute.

The historical development of the statutory provisions with respect to unification and consolidation of carriers, contrary to the views of the court below, also clearly demonstrates that the securing of the Commission's approval, in accordance with the prescribed procedure, of participation in any transaction within the purview of such provisions is mandatory and not permissive.

As we have seen, with the passage of the Transportation Act of 1920, the Commission was given authority to permit the consolidations and mergers of rail carriers (41 Stat. 480). By that Act, the Commission was charged with the duty of preparing a plan for the consolidations of railroads. It was also empowered to approve, when in the public interest, the acquisition by one carrier of the control of another carrier in any manner not involving the consolidation of such carriers into a single system for ownership and operation."

" Section 5 (2) provided (41 Stat. 481) :

Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in

No prohibitory provisions comparable to paragraph (4) were, however, enacted. These provisions²⁰ remained in effect until the enactment of the Emergency Railroad Transportation Act of 1933. That Act authorized consolidations and mergers, purchases, leases, and acquisitions of control upon application to the Commission and its finding "that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest" (48 Stat. 217). As stated above, acquisitions of control through stock ownership by non-carrier corporations were included and such non-carriers made subject to Section 20 and 20 (a) to the extent provided by the Commission. The Act further stated that "the carrier or carriers or corporation seeking authority therefor shall

the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

²⁰ As to the permissive character of these provisions, compare *Snyder v. N. Y., C. & St. L. Rd. Co.*, 118 Ohio St. 72, affirmed, 278 U. S. 578, *New York, C. & St. L. R. Co. v. Frank*, 314 U. S. 360.

present an application." A new paragraph (6) declared it to be unlawful for any person, except upon the approval of the Commission, to accomplish or effectuate the control or management in a common interest of any two or more carriers "however such result is attained, * * *" (48 Stat. 218). The district courts were given jurisdiction to enjoin violations of the provisions of Section 5 or any order by the Commission thereunder (48 Stat. 219).

That Congress intended by these amendments to remove any doubt that securing the Commission's approval under these consolidation provisions was mandatory is evidenced by the following statement in the report of the House Committee on Interstate and Foreign Commerce (H. Rep. No. 193, 73rd Cong., 1st sess., p. 16):

A means having been furnished under paragraph (4) by which consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control may be effected, it is intended by this paragraph [par. 6] to prevent consolidations, unifications, common controls, and common managements being effected, in the future, otherwise than as authorized in such paragraph (4), it being the intention that the Interstate Commerce Commission shall have an opportunity to pass upon such matters in order that transactions resulting in combinations and controls of carriers may be accomplished in an orderly manner, with

due regard to the consolidation plan and the public interest. * * *

The Motor Carrier Act of 1935, 49 Stat. 543, 555, dealt separately with consolidations, mergers, and acquisitions of control of motor carriers. Section 213 (a) provided that "it shall be lawful, under the conditions specified below [application to the Commission, hearing, findings of public interest, etc.], *but under no other conditions*" [italics supplied], for a motor carrier to purchase, lease, acquire control, etc., of another motor carrier and for non-carriers, controlling one or more motor carriers, to acquire control of another motor carrier through ownership of its stock. This paragraph also provided that the "carrier or carriers or the person seeking authority therefor shall present an application." Section 213 (b) (1) made it unlawful for any person, except as provided by subparagraph (a), to accomplish or effectuate the common control or management of any two or more motor carriers. These provisions were clearly a counterpart of the provisions of Section 5 dealing with rail carriers (*McLean Trucking Co., Inc. v. United States*, No. 31, this Term, decided January 17, 1944, pamphlet p. 12), and it is plain that all the provisions of the 1933 Act making the securing of the Commission's approval compulsory, were carried over in the Motor Carrier Act.

The Transportation Act of 1940 consolidated in Section 5 common provisions dealing with con-

solidations, mergers, purchases, and the like, of rail, motor, and water carriers. 54 Stat. 905. Again, all the provisions which made the securing of the Commission's approval mandatory, were preserved. At the same time, the words "or otherwise," above discussed (p. 32, *supra*), were added to the non-carrier control clause of Section 5 (2) (a). And finally, by paragraph (11) it was provided that the Commission's authority under Section 5 "shall be exclusive and plenary." 54 Stat. 908.

This evolution of Section 5 likewise demonstrates, as Judge Soper observed (R. 68), that "each extension of the Commission's power to permit consolidations has involved also the extension of its power to secure and exercise regulatory control." The Commission's refusal to consider the present transaction on the merits without having the application of the non-carrier before it, is not at all inconsistent with this broad purpose or restrictive of the Commission's powers, as the majority of the district court seemed to think (R. 65). The insistence upon an application by the non-carrier is no idle formality, but instead is necessary to preserve in full vigor the broad regulatory powers granted the Commission over non-carriers who are permitted to acquire control of carriers.—As has been pointed out, Section 5 (3) of the Act provides that "whenever a person

which is not a carrier is authorized by an order entered under paragraph (2) to acquire control of any carrier * * * such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control * * *." The provisions named, insofar as they are applicable to motor carriers, are Sections 204 (a) (1) and (2) and 220 (relating to reports, accounts, and so forth of carriers) and Section 214 (relating to issue of securities and assumptions of liability of carriers). Appendix, *infra*, pp. 55-58. The Commission, as it is empowered to do under Section 5 (3), might have determined that none of these provisions need be applied to Union. That is unimportant. The statute gives the Commission power to determine to just what extent a non-carrier making such an application is to be treated as itself a carrier. But Union, through its failure to file an application and have this transaction approved by order, was attempting to deprive the Commission of its jurisdiction under this Section to make the proper determination with respect to it. The district court independently sought to determine how far these regulatory provisions need be made applicable to Union, and concluded (R. 65-66) that in view of the application by the carrier (Refiners),

the Commission would have full and complete authority to the extent of the public interests involved. But since the statute gave the Commission "exclusive and plenary" (sec. 5 (11)) power to decide this complicated and technical question, the court under the "primary jurisdiction" doctrine exceeded its authority in assuming to make this determination in the first instance. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 431-433; *Armour & Co. v. Alton R. Co.*, 312 U. S. 195.

Another reason appears why it was appropriate that Union be an applicant before the Commission. Section 5 (2) (b) provides that the Commission may attach reasonable terms and conditions to any order approving a transaction. Obviously, the Commission could not validly address any such order or conditions to Union if Union was not even a party before it having had an opportunity to be heard. Yet in view of Union's paramount interest in the railroad tank car business and the resultant possibility that it might operate the motor tank truck business sought to be acquired, in the private interests of its competing railroad clients rather than of the public, the Commission, on the merits, might very well have found it ap-

propriate to make certain conditions applicable to Union.

Presumably, it will be urged by appellees that the present insistence upon the application of the controlling non-carrier in a carrier purchase case is inconsistent with the Commission's past practice. But while the Commission's previous regulations²¹ had not required an application by the controlling non-carrier in a carrier purchase case, and while the Commission had admittedly approved many such purchases without the non-carrier's application, still it does not appear that the question had ever been specifically raised before. In any event, no amount of administrative precedent or regulations can justify; at least for prospective application, the wrong construction of a statute. *United States v. Missouri Pacific R. Co.*, 278 U. S. 269, 280; *Interstate Commerce Commission v. Railway Labor Ass'n*, 315 U. S. 373 380. We submit that the Commission's present construction of the Act is the only one permissible under the Act.

²¹ See 5 Fed. Reg. 4698. By an order issued on September 17, 1943 (8 Fed. Reg. 13193-94), subsequent to the decision in the present case, these regulations have been amended so as to require the controlling non-carrier to be made a party to any carrier application to purchase the property of another carrier or acquire control over it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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MARCH 1944.

A P P E N D I X

The Interstate Commerce Act, as amended by the Act of September 18, 1940, 54 Stat. 899, sets forth the National Transportation Policy as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, to be administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U. S. C. 1.)

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (3) (b) provides:

For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. (49 U. S. C. 1 (3) (b).)

Section 5 (2) provides in part:

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through owner-

ship of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a

carrier by railroad subject to this part, or any person which is controlled by such a carrier or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. (49 U. S. C. 5 (2).)

Section 5 (3) (a) provides:

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2)

and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11); inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest. (49 U. S. C. 5 (3).)

Section 5 (4) provides:

It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory

paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management. (49 U. S. C. 5 (4).)

Section 5 (11) provides:

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to en-

able them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. (49 U. S. C. 5 (11).)

Section 5 (13) provides:

(13) As used in paragraphs (2) to (12), inclusive, the term "carrier" means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III. (49 U. S. C. 5 (13).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 204 (a) provides in part:

It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. (49 U. S. C. 304 (a).)

Section 214 provides:

Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the par value of the securities to be issued, together with the par value of the securities then outstanding, does not exceed \$500,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than \$100,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of their issue: *Provided further,* That the exemption in

section 3 (a) (6) of the "Securities Act, 1933," is hereby amended to read as follows: "(6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;". (49 U. S. C. 314.)

Section 220 provides in part:

(a) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this part. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the

contract carrier by motor vehicle as required by section 218 (a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof. (49 U. S. C. 320.)

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 589.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, COASTAL TANK LINES, INC., ET AL., *Appel-*
lants,

v.

MARSHALL TRANSPORT COMPANY, WARREN C. MARSHALL, RE-
FINERS TRANSPORT TERMINAL CORPORATION, *Appellees.*

BRIEF IN BEHALF OF COASTAL TANK LINES, INC.,
LEAMAN TRANSPORTATION COMPANY, PETRO-
LEUM TRANSPORT COMPANY, SHIPLEY TRANS-
FER COMPANY, VEDDER TRANSPORTATION
COMPANY, M. I. O'BOYLE & SON, CLARE M. MAR-
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 589.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, COASTAL TANK LINES, INC., ET AL., *Appel-*
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v.

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SHALL, WILLIAM F. CROSSETT AND RICHARD F.
KLINE, APPELLANTS.**

The main purpose of this brief is to emphasize the few particular but important facts of record before the Commission pertinent to the question of law here presented. While the whole record of testimony before the Commission is before this Court only those portions of it have here been printed that are needed for this discussion.

PARTICULAR FACTS.

A Mr. Turner, and two associates, were the former owners of three small petroleum carrying motor truck companies in the Central West. Mr. Turner was the President. Between these gentlemen and the Union Tank Car Company negotiations arose and were concluded as a consequence of which the Union Tank Car Company "set up a corporation" for the purpose of acquiring the businesses of those former three small companies owned by Mr. Turner and his associates (Printed Record 45-46). It was contemplated that thereafter additional acquisitions of other petroleum carrying motor truck lines would occur (R. 14, 46).

The corporation so set up was given the name Refiners Transport and Terminal Corporation. In exchange for the ownership of the former three small companies Mr. Turner and his associates received some stock in Refiners Transport and Terminal Corporation and Union received all the remainder. Soon thereafter Union added to its commitment by putting in considerably larger sums of money and received additional stock of Refiners therefor. That finally brought its holdings to around 85 per cent of Refiners voting stock. New motor carrier acquisition commitments then were made in the name of Refiners, subject to the approval of the Interstate Commerce Commission, including the Marshall trucking company interests and various others, Union to furnish the necessary additional funds to be represented by increased stock of Refiners to be owned by Union. At the time of the hearing in this proceeding the whole program of intended acquisitions of motor carriers had not been completed, more being then contemplated (R. 46-54).

It therefore appeared of record to the Interstate Commerce Commission that Union Tank Car Company, one of the several very large operators of railroad tank cars for the

transportation of petroleum and its liquid products, in the manner stated, inaugurated a program of extensive engagement in the competitive business of motor tank truck transportation of petroleum and its liquid products from Eastern and Central Western refiners to consuming markets. For that purpose Refiners Transport and Terminal Corporation was "set up", Union Tank Car Company taking all the issued stock of Refiners except a small amount retained by Mr. Turner and his former associates who were to remain in the management as technically qualified men in the motor truck operating field.

The attempted Marshall acquisition took the form of an agreement to purchase assets consisting of good will, operating franchises, equipment and terminal properties; the same plan was employed with respect to several of the other attempted acquisitions governed by subsequent applications to the Interstate Commerce Commission. One, however, took the form of an agreement in the name of Refiners to purchase the stock of another tank truck motor carrier.

II.

ARGUMENT.

With those facts before it the Commission had a clear case in which Union Tank Car Company, claiming not to be a common carrier by railroad or "affiliated" with railroads in the statutory sense, is seeking to become largely dominant in the motor tank truck petroleum transporting field in an important area of the country. Whether the setting up of Refiners was or was not designed separately for the purpose it was urged before the Commission and is now urged before this Court the mere circumstance of its existence would absolve Union Tank Car Company from the need to be a party applicant and consequently from Commission regulation of its securities issues under Section 314, Title 49, U. S. Code, which applies to "corporations authorized by order of the Commission to acquire

control of two or more motor carriers". For the same reason it is further urged that Union Tank Car Company would be absolved from Commission regulation under Section 5(3) of U. S. Code, Title 49 concerning its reports and securities issues should this application only in the name of Refiners be proper. That paragraph of Section 5 applies to any person "which is not a carrier" but which may be authorized by order of the Commission to "acquire control of two or more carriers".

There is no need in the present case to explore all the remoter possibilities of the application of these provisions of the statute in other situations. It is enough that in the particular case now before this Court the facts of record before the Commission clearly made this present case one within the statute as to proper parties. This was no casual investment undertaken by Union Tank Car Company even if that would make any difference under the law. It is not a case calling for determination by the Commission or the Court whether a human being owning the majority of stock of a motor carrier must always be a party applicant in a proceeding in which that motor carrier seeks to acquire control of another motor carrier. It is instead a plain and clear case of the intentional invasion of the motor carrier tank truck field by Union Tank Car Company through the instrumentality of an intermediate corporation which it was responsible for bringing into existence and which except for a small amount of management shares Union Tank Car Company owns and completely dominates.

That presents in reality only one question here to be decided rather than two. *The one outstanding question is whether or not the word "control" as used in the statute embraces the purchase of operating franchises, good will, and equipment of a motor carrier with a view to its later extinction as a separate corporation, or whether it means only the purchase and continued ownership of stock.* It is believed that is the only important question presented for the reason that if it were to be agreed or determined that

the word "control" has the broader meaning, then beyond any serious doubt the statute would require Union Tank Car Company in the present case to be an applicant to the Commission and, if successful, make itself to that measure of regulation by the Commission which, as a non-carrier, it would be subjected to.

Congress contemplated that a non-carrier might undertake to acquire control of two or more motor carriers and made provision for it in the statute. It was declared in Section 5(2) (a) to be lawful, with the approval and authorization of the Commission—

"for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock *or otherwise*; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock *or otherwise*". (Italics supplied.)

In that event the statute goes on to provide in Section 5(2)(b) that whenever such a transaction is proposed under sub-paragraph (a) the carrier or carriers "or persons seeking authority therefor" shall present an application to the Commission, etc.

In short, if the real party in interest is a non-carrier which, already controlling one carrier, desires to acquire another, the non-carrier is required to make an application to the Commission and if successful to subject itself to the required degrees of Commission regulation as if a "holding company" under Sections 5(2)(b) and 314 of U. S. Code, Title 49.

Those matters being clear the case turns, as stated, upon the conception of "control" as used in the statute because here the form of the proposed transaction with Marshall was not the acquisition of its stock but the purchase of the operating franchises, good will, equipment, and terminal properties.

Before the Commission and in the court below counsel for the appellees stressed that Section 5(2)(a) not only

authorizes a non-carrier to acquire control of two or more motor carriers "through purchase of stock or otherwise" but also authorizes a carrier (whether rail, water, or motor) to "purchase * * * the properties" of another motor carrier. The argument appears to be that since here Refiners (a carrier) proposes to purchase the Marshall "properties" the case cannot be one in which Union is undertaking to acquire "control" of the Marshall corporation because no purchase of Marshall stock is intended.

But in its entirety the argument assumes that if the case happens to fit the description of two things which Congress has authorized upon Commission approval then only that one of the two authorizations is applicable which suits the convenience of Union Tank Car Company to be absolved from the need to be a party applicant and subject itself to holding company regulation by the Commission.

That the word "control" as defined by Congress includes the purchase of operating franchises, good will, terminal and equipment properties of motor carriers is not very difficult to conclude. Thus to begin with Section 5(2)(a) itself authorizes such control "through ownership of stock or otherwise". While the words "or otherwise" are an addition to the statute as previously passed the change only made that particular paragraph consistent with other paragraphs of Section 5 previously enacted and having the same purpose and effect. Thus the prohibition part of Section 5, found in paragraph 4, previously made and still makes it unlawful to enter into any transaction as described in Section 5(3) (without Commission approval)—

"or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever." (Italics supplied.)

Further to fortify its broad intent Congress provided in Section 1(3)(b) that—

“For the purposes of sections 5 * * *, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, *or through or by any other direct or indirect means*”; (Italics supplied.)

As here pointed out by the Commission, motor carriers, in their present stage of development, are relatively small enterprises. They do not as a rule have securities floating around in the hands of an investing public. Instead they are owned by only one or several people. Their capitalization is nominal. Their properties consist mostly of good will, their operating franchises derived from the Commission, their truck equipment, their spare parts of supplies, and their rented, or in some few instances owned, terminals. Congress had in view an important public policy in encouraging the lessening of the large number of these individual motor carriers through consolidation and other forms of integration into larger systems. (*McLean Trucking Co. v. U. S.*, No. 31, decided by this Court January 17, 1944.) It did not completely discourage accomplishment of that important national policy by disallowing non-carriers to acquire two or more motor carriers. But it did interpose important safeguards in those events. Congress chose to subject those non-carriers to a certain quantity of Commission regulation deemed important in the public interest whenever non-carriers may come forward with some plan to acquire two or more motor carriers. It said that if a non-carrier so be “authorized by order” to acquire control of two or more motor carriers if (the non-carrier) must be

subjected to a described measure of commission regulations.

That salient purpose could hardly have been intended by Congress to lend itself to very easy circumvention through the mere choice to purchase operating franchises, good will and properties rather than stock. Many motor carriers are not even incorporated, so in those instances there would even be no stock to be purchased.

As held by this court in *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, the word "control" is to be broadly construed and has no technical meaning. The Congressional intent is to be gathered from the environment and amplifying words which the particular legislation may contain. Thus while in *Federal Trade Commission v. Western Michigan Company*, 272 U. S. 555, dealing with the Clayton Act, the word "control" as there used was given a narrow meaning, there were no amplifying and broad terms of definition by Congress such as are here to be found in the Interstate Commerce Act. This emphasis upon the significance of the sweeping terms in which Congress here defined its meaning in using the word "control" is further deserved by the decision in *Gulf Refining Company v. Fox*, 11 Fed. Supp. 425, 430.

So then the case somewhat quickly narrows down to this: Congress authorized, with Commission approval, one motor carrier to purchase the "properties" of another. Also it authorized a non-carrier to acquire "control" of two or more motor carriers either directly or indirectly, by any manner or means whatsoever, either through acquisition of stock "or otherwise". Here the transaction which Union Tank Car Company has attempted most certainly fits the latter description. If it also fits the former as one in which seemingly an existing carrier seeks to purchase the property of another that does not lessen the circumstance

that at one and the same time and by the same means Union Tank Car Company is undertaking to acquire control of the Marshall and other motor carriers. It must, therefore, as the real person in interest, be the "applicant."

To accept the argument of appellees and the majority of the court below would seemingly mean that in the entire field of motor carrier acquisitions non-carriers may escape all Commission regulation of themselves by the simple expedient of setting up an intermediate and virtually wholly owned new corporation first to purchase one motor carrier and then in its name to apply for authority to purchase the properties of an indefinite number of others. Congress could hardly have intended that easy means of escape.

The two dissenting members of the Commission appear to be much concerned that if their majority brethren were here to be upheld by this Court then that in principle it would always be necessary for the individual owner of the majority stock of a motor carrier to be a party applicant when that motor carrier seeks to acquire control of another either through purchase of stock "or otherwise". But that cannot be so because Congress had no purpose to regulate mere individuals who are majority stockholders of existing motor carriers. Nor because ultimately Mr. John D. Rockefeller may own a practical controlling interest in Union Tank Car Company should the dissenting minority of the Commission be apprehensive that in principle a decision adverse to them in this case would make it necessary that Mr. Rockefeller be a party applicant. Congress did not intend that the statute should be pushed to such far-fetched and unrequired extremes.

In any event it is enough that in the present particular case under its own particular facts the situation is clearly one in which the full Commission majority was right.

CONCLUSION.

• It is respectfully urged that the decision and order of the majority of the court below be reversed and that it be directed to enter an order dismissing the suit.

Respectfully submitted,

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 589

**THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC., et al.,
Appellants,**

vs.

**MARSHALL TRANSPORT COMPANY,
WARREN C. MARSHALL,
REFINERS TRANSPORT & TERMINAL CORPORATION,
Appellees**

**Appeal from the District Court of the United States
for the District of Maryland**

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED BELOW

Supplemental Report and Order of the Commission,
Docket No. MC-F-1936—*Refiners Transport & Terminal
Corp.—Purchase—Marshall* (1943), 39 MCC 93.

Report of Commission, on reconsideration—*Refiners
Transport & Terminal Corp.—Purchase—Marshall* (1943),
39 MCC 271.

* Opinion of the District Court of the United States for
the District of Maryland—*Marshall Transport Co., et al.,
v. United States* (1943), 52 F. (Supp.) 1010.

United States of America
IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 589

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
COASTAL TANK LINES, INC., et al.,
Appellants,

vs.

MARSHALL TRANSPORT COMPANY,
WARREN C. MARSHALL,
REFINERS TRANSPORT & TERMINAL CORPORATION,
Appellees

Appeal from the District Court of the United States
for the District of Maryland

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

Marshall Transport Co., Inc., a common motor carrier under Part II of the Interstate Commerce Act and Warren C. Marshall¹ desire² to sell certain operating rights, truck-tractors and tank trailers and other carrier operating property to Refiners Transport & Terminal Corporation,³ also a motor common-carrier under Part II of the Interstate Commerce Act.

Accordingly Marshall Transport Co., Inc., Warren C. Marshall and Refiners Transport & Terminal Corporation filed a "BMC-44" application with the Interstate Commerce Commission asking for authority to consummate the proposed transaction under Section 5 (2)(a)(i) and Section 5(2)(b) of the Interstate Commerce Act.

A hearing was held before an Examiner of the Interstate Commerce Commission who filed a report recommending that authority for the proposed transaction be granted (R. 3). Exceptions were filed and after considering arguments and briefs, Division 4 authorized the transaction, Commissioner Mahaffie dissenting. Thereafter a rehearing by the full Commission was granted.

¹The truck-tractors and tank trailers and land upon which the Glen Burnie terminal is situated are owned by Warren C. Marshall and he leases such real and personal property to Marshall Transport Co., Inc. The Marshall operating rights are from Baltimore, Maryland to defined areas in Pennsylvania, Virginia, Delaware and the District of Columbia. Other than by the proposed acquisition, this territory is not served by Refiners Transport & Terminal Corporation which operates in the mid-west.

²The evidence is uncontradicted that Marshall Transport Co., Inc., is unable to continue successfully as a carrier as a result of its loss of its general manager and the illness of Warren C. Marshall, its chief executive and principal stockholder (R. 14). The transportation service being rendered would be lost to the public if the purchase be not approved.

³A history of the organization of Refiners Transport & Terminal Corporation is set forth in Appendix A hereof.

The "Report of the Commission on Reconsideration" (R. 26) decided August 3, 1943, and served August 12, 1943, determined that the application should be dismissed,⁴ and on September 2, 1943, an order of dismissal (R. 35) was entered, dismissing the application.

The sole reason (R. 32) for the dismissal was that one of the party applicants is Refiners Transport & Terminal Corporation, and the application is not signed or filed by its majority⁵ stockholder, Union Tank Car Company.

Suit to set aside the dismissal order was filed⁶ on September 10, 1943, in the United States District Court for the District of Maryland. Arguments were heard in said Court on September 20, 1943 before the Honorable Morris A. Soper, Circuit Judge, Honorable William C. Coleman, District Judge, and Honorable W. Calvin Chesnut, District Judge. On October 16, 1943, the District Court filed its opinion setting aside the Commission's order of dismissal, Judge Soper dissenting. Final decree pursuant to the opinion was entered on November 1, 1943, from which the appeal herein was taken.

⁴Twenty days were allowed for Union Tank Car Company to file an application if it cared to do so, but this was not done as Union did not believe it would be within the jurisdiction of the Commission.

⁵The application and record show that Union Tank Car Company owned 82.6% of the issued and outstanding capital stock of Refiners Transport & Terminal Corporation (R. 14).

⁶Suit was filed under Title 28, U. S. Code, Section 41, subdivision 28 and Sections 43, 44, 45, 46, 47, 47a and 48, and under Title 49, U. S. Code, Sections 17(9) and 305(g) (h) (being Sections 17(9) and 295(g) (h) of the Interstate Commerce Act).

OUTLINE OF STATUTORY PROVISIONS

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix of Appellants' brief. Of these provisions, the one with which we are immediately concerned is Section 5(2)(a) and (b) which provides as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or *for any carrier*, or two or more carriers jointly, to purchase, lease, or contract to operate *the properties*, or any part thereof, *of another*; or for *any carrier*, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or *for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise*; * * *

"(b) Whenever a transaction is proposed under sub-paragraph (a), *the carrier or carriers or person seeking authority* therefore shall present an *application* to the Commission, * * *." (Emphasis supplied to indicate the clauses in issue here.)

A careful reading of paragraph (a) of Sec. 5(2) discloses that it refers to *two* distinct *types* of situations. The

⁷The term "appellants" as herein used, refers to the United States and the Interstate Commerce Commission, unless otherwise indicated.

first type is unification, mergers, and acquisitions of control of carriers *by other carriers*. The second type is unification, mergers, and acquisitions of control of carriers by *persons not carriers*.

The same two distinct classes of cases are also recognized by subdivision (b) of Section 5(2), which says, "Whenever a transaction is proposed under subparagraph (a), the carrier * * * or person seeking authority therefor shall present an application to the commission * * *."

It is apparent, then, that Section 5(2)(a) and (b) distinctly deals with two types of situations, viz., those involving *carriers*, and those involving *persons not carriers*.

For *carriers*, there are three distinct classifications of permissive transactions. The first is merger or consolidation of two or more carriers. The second is that which we herein designate as the "property purchase clause" and relates to an application of any carrier or two or more carriers to "purchase, lease or contract to operate the properties" of another carrier. The third is the acquisition of control of one carrier by another carrier through stock ownership "or otherwise."

For *persons not carriers*, there are two distinct classifications of permissive transactions. The first is acquisition of control of two or more carriers by a person not a carrier through stock ownership "or otherwise." The second, hereinafter designated as the "carrier control clause," is concerned only with a person not a carrier but which has control of one or more carriers and seeks to acquire control of another carrier by stock ownership "or otherwise."

It accordingly appears that Section 5(2)(a) may be outlined as follows:

TYPE A

Where unification is effected by a carrier or carriers, there may be:

- (1) Consolidation or merger of two or more carriers.
- (2) Purchase, lease or contract to operate properties of another carrier
- (3) Acquisition of control of one carrier by another carrier or carriers through stock ownership "or otherwise."

TYPE B

Where unification is effected by a non-carrier, there may be:

- (1) Acquisition of control of *two* or more carriers by a person not a carrier through stock ownership "or otherwise"
- (2) Acquisition by a person which is not a carrier and which has control of one or more carriers, of control of another carrier, through ownership of its stock "or otherwise."

STATEMENT OF THE ISSUE

Marshall Transport Company, a carrier, desires to sell its operating rights and other property to Refiners Transport & Terminal Corporation, also a carrier. Plainly the transaction falls within the property purchase clause of Section 5(2)(a) of the Interstate Commerce Act; that is, Type A (2) in the above outline.

Appellants claim that the transaction must also come within the carrier control clause of Section 5(2)(a) of the Interstate Commerce Act; that is, Type B (2) in the above outline, and that by reason thereof Union Tank Car Company must be a party applicant.

The issue here presented was succinctly stated, reviewed and disposed of by Division 4 of the Interstate Commerce Commission (Commissioner Mahaffie dissenting) as follows (R. 16-17):

"We do not agree with protestants' contention that failure of Union to be made a party applicant herein necessitates dismissal of the application. That Union is not a necessary applicant for control authority herein is in line with our past consistent policy in such cases. *Virginia-Carolina Coach Co.—Purchase—Evans*, 1 M.C.C. 309, *Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo*, 5 M.C.C. 479, 36 M.C.C. 325; *Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages*, 15 M.C.C. 644, and *Motor Express, Inc.—Purchase—Erie Freight Lines, Inc.*, 38 M.C.C. 185. The instant transaction involves purchase by a motor carrier of properties of a motor carrier and, as such, falls directly within the permissive clause of Section 5(2)(a), making it lawful 'for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another.' We are unable to agree with protestants' argument that this transaction falls

within the clause of that paragraph making it lawful 'for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise.' Much of protestants' argument is based on construing the words 'or otherwise,' which were added by the Transportation Act of 1940, as including a purchase or other unification effected by a subsidiary motor carrier of such a non-carrier 'person.' As we view it, the addition of these words was to embrace methods by which control of an additional separate and continuing carrier could lawfully be effected other than through stock ownership among the other authorized transactions. Compare *Suddarth—Purchase—Pettyjohn*, 37 M.C.C. 185. Union here controls Refiners, the motor-carrier applicant, and, following the instant purchase, it would continue to be in control of the same single motor carrier. There would be no separate additional carrier under Union's control."

SUMMARY OF THE ARGUMENT

A new policy was inaugurated by the Transportation Act of 1920.⁸ Prior to that time consolidations were not exempt from the Sherman Antitrust Act or other statutes prohibiting business combinations. Such exemption was provided for by the Transportation Act of 1920.⁹ Consolidations could thereafter be approved by the Interstate Commerce Commission. Perhaps the keynote of this legislation was that the Commission was directed to make an over-all plan for organization of systems. It was empowered to approve of such consolidations of carriers as would be in harmony with such a plan.

However, the 1920 Act did not provide for Commission approval of combinations effected by means other than those enumerated in the statute and did not prohibit combinations without Commission approval by such means as were not mentioned in the statute.¹⁰ It was early held that the 1920 Act did not prohibit the use of a "holding company" as a *connecting link* between carriers. That is, a holding company could hold the stock of two or more carriers and thereby weld them effectively into one system, and the Commission had no jurisdiction over the *connecting link*, the "holding company," and was powerless to approve or disapprove the combination.

⁸Transportation Act of 1920, C. 91, 41 Stat. 474 *et seq.*

⁹Sec. 5 (8).

¹⁰*Stock of Denver & Rio Grande Western R. R.* (1921), 70 I. C. C.

In 1929,¹¹ 1930,¹² 1931,¹³ and 1932¹⁴ the Interstate Commerce Commission in its annual reports recommended that its jurisdiction be extended so as to include this *connecting link*, the "holding company."

The House of Representatives authorized¹⁵ extensive studies which were conducted for its Interstate and Foreign Commerce Committee under the direction of Walter M. Splawn¹⁶ as Special Counsel. The studies extended over a period of two years. The Committee held hearings and took the testimony of transportation leaders. The studies and the testimony both showed concern over means of combination, or connecting links, or mediums, particularly the "holding company," which were outside the jurisdiction of the Commission, and consequently could and were being used to thwart the Commission's over-all consolidation plan and jurisdiction. It was recommended that the *connecting link* be brought within the jurisdiction of the Interstate Commerce Commission. Such was the objective of the proposed new legislation. This purpose was accomplished by the enactment of the Emergency Transportation Act of 1933.¹⁷

Similar provisions for motor carriers were included as Section 213 of the Motor Carrier Act of 1935.¹⁸

¹¹Annual Report of Interstate Commerce Commission for 1929, page 80. See page 18 herein.

¹²Annual Report of Interstate Commerce Commission for 1930, p. 97. See Appendix B.

¹³Annual Report of Interstate Commerce Commission for 1931, p. 121. See Appendix C.

¹⁴Annual Report of Interstate Commerce Commission for 1932, p. 101. See Appendix D.

¹⁵House Resolution 114 (1929), 71st Congress, 2nd Session.

¹⁶Now a member of the Interstate Commerce Commission.

¹⁷Emergency Transportation Act of 1933, c. 91, 48 Stat. 217 *et seq.*

¹⁸Motor Carrier Act of 1935, c. 498, 49 Stat. 543 *et seq.*

These two statutes permitted combinations of carriers by certain prescribed methods with Commission approval, and prohibited combinations by any other methods. The effect of the statute was that the Commission could permit only such combinations as were to be accomplished in one of the methods designed by statute. All other combinations were prohibited.¹⁹

It was found that methods of combining other than those named in the statute of 1933 were desirable, and in 1940 the statute was amended so as to enlarge the number of permissive methods. That this was the sole purpose was expressly declared in the House Conference Report.²⁰ This was accomplished by the simple addition of the two words "or otherwise" to certain clauses in Section 5(2)(a) of Part I of the Act, and extending it so that it included motor and water as well as rail carriers. The corresponding section²¹ of the Motor Carrier Act was repealed.

The purposes of these various amendments were expressly declared in the Congressional hearings, particularly during the hearings following the extensive two-year studies which preceded the adoption of the Emergency Transportation Act in 1933. In these hearings it was declared repeatedly that it was desired to include within the Commission's jurisdiction the *mediums* of combining. That was the purpose of the amendments made by the Emergency Railroad Transportation Act of 1933, to which the amendments of 1940 were added almost as an afterthought.

¹⁹Sec. 5 (6), added to the Interstate Commerce Act by the Emergency Transportation Act of 1933.

²⁰House Conference Report No. 2832, page 68. See pertinent quotation on page 26 hereof.

²¹Sec. 213.

The purpose of the legislation was not to make stockholders who owned stock in only one carrier subject to the Interstate Commerce Commission's jurisdiction. The suggestion that a stockholder of only one carrier be made subject to the Act was expressly rejected by the sponsors of the legislation.²²

The language of the Interstate Commerce Act is in marked contrast to the Holding Company Act of 1935, enacted during the same decade and which expressly declared that it did include in its terms a pure holding company, even if that holding company owned stock in only one utility.²³ Such a holding company bill applicable to "carrier holding companies"²⁴ was actually proposed but failed of enactment.

In contrast to such Holding Company Act and the proposed bill, the Interstate Commerce Act has no terms extending its provisions to a stockholder owning stock in only one carrier. The plain terms of Sections 5(2)(a) and 5(3) of the Interstate Commerce Act are to give jurisdiction over a stockholder only if that stockholder is a means of connecting the carrier with another carrier. The purpose is to give the Commission jurisdiction to authorize any conceivable method of combining carriers and to prevent combinations without Commission approval.

²²See quotation from Commissioner Eastman's testimony on pages 21-22 hereof.

²³Even that Act, however, provided an exemption from its terms for a corporation other than a pure holding company, that is, even the Holding Company Act did not apply to a corporation such as Union Tank Car Company which owns tangible property and carries on a business of its own. See also the discussion of Senator Wheeler's proposed "Carrier Holding Company" bill, S. 2016, at pages 30-34 herein.

²⁴S. 2016, 76th Congress, 1st Session (1939).

If one carrier purchases the property of another, as is proposed here, the purchase and the ownership of the property is the tie that binds the operations together. A purchase is one of the permissive methods included in the Emergency Railroad Transportation Act of 1933, the Motor Carrier Act of 1935, and the Transportation Act of 1940. A purchase by one carrier of the properties of another does not defeat the jurisdiction of the Commission under the Emergency Railroad Transportation Act of 1933 or under the 1940 Transportation Act, and there is no occasion to endeavor to distort a simple purchase so as to bring it into one of the remedial clauses added by the Emergency Transportation Act of 1933 as amended in the 1940 Act. It is plainly within the property purchase clause.

The transaction is not within the carrier control clause. That clause does not apply unless a carrier is acquired. A carrier is defined in the statute as being a *person*,—a person engaged in transportation. Here no person, no carrier is being acquired. The subject of acquisition is only property. But one carrier continues, Refiners Transport & Terminal Corporation. Inasmuch as the Commission already has complete jurisdiction over Refiners, there is no occasion to extend its jurisdiction, and it is not desirable or legally possible for the purpose of giving the Commission jurisdiction to place it within the carrier control clause. The Commission's jurisdiction over the combined properties and the carrier operating them (*i. e.*, the purchaser) is as complete as it was prior to the purchase.

It is not reasonable that Congress intended the words "or otherwise" to bring a corporate carrier's controlling stockholder or stockholders before the Commission as a party applicant, and thus within the Commission's jurisdiction. If Congress had intended the Commission to have jurisdiction over a corporate carrier's stockholder, it

would have granted such jurisdiction explicitly and would have given such jurisdiction over all such stockholders, not, as appellants contend, over only stockholders of those carriers who seek to make acquisitions from another carrier.

Other clauses of the Act show clearly that it was not intended by Section 5(2)(a) to extend the jurisdiction of the Commission to an owner of stock of only one carrier, even though that carrier seeks to purchase the property of another carrier. Sections 204(a)(7) and 220(d) authorize the Commission to examine a controlling stockholder's records "• • • as the Commission deems relevant to such person's relation to or transactions with such carrier." Having declared jurisdiction to this extent, it is plain by familiar rules of statutory construction that the jurisdiction goes no further.

Thus, both historically and on the face of the statute, the purchase clause and the carrier control clause are both permissive, and are alternative grounds for a single application to the Commission. The carrier control clause deals with *control* of a "carrier." The property purchase clause deals with a *purchase* of "properties." On the face of the statute the carrier control clause does not apply to a purchase of properties.

The interpretation adopted by the Examiner, by Division 4, and by the District Court, is that adopted and followed by the Commission and particularly Division 4 thereof, in hundreds of cases. In fact, prior to the case at bar, no stockholder in control of a carrier had been asked to come within the jurisdiction of the Commission as a condition of granting approval of that carrier's purchase of property of another. On the contrary, a stockholder had been expressly rejected as the party applicant. If appellants' contention were sound, all of the hundreds of cases in which

a corporate carrier but not its controlling stockholder or stockholders was a party applicant, are in error and the Commission did not have jurisdiction to grant the application. Consequently, if appellants' contention were sound, millions of dollars of carrier properties have been combined illegally. Havoc has been created by the Commission's acceptance and granting of all such applications, if the appellants' contention is sound.

Furthermore, the carrier industry by appellants' contention would be denied capital to expand because investors would not buy a carrier's stock if thereby the investor would become subject to the jurisdiction of the Interstate Commerce Commission if that carrier wanted to expand by buying the property of another carrier.

The plain meaning of the statutory words, the canons of statutory construction, the underlying trend and growth of the legislation, the express declarations of Congressmen and other sponsors of the legislation, the interpretations placed upon the Act by those charged with the administration thereof, namely, Division 4 of the Interstate Commerce Commission, all show beyond doubt that the Commission had the jurisdiction and the duty to accept and act upon the application filed by the corporate carrier without an application being made by its principal stockholder. It had no authority in the case at bar to require that the stockholder of a carrier submit to the jurisdiction of the Interstate Commerce Commission as a condition of authorizing that carrier to purchase the property and operating rights of another carrier.

ARGUMENT

I.

ANALYSIS OF LEGISLATIVE BACKGROUND

(Reply to pages 28 to 35, 40 to 46 of Appellants' Brief)

The history of the Interstate Commerce Act and particularly Section 5 thereof is discussed by appellants in two different sections of their brief.²⁵ In reply and in supplement thereto appellees respectfully submit the following historical analysis.

A. The Transportation Act of 1920 originated policy of encouraging combinations of carriers, and began the regulation thereof.

From the time of the Transportation Act of 1920, circumstances surrounding and leading up to the enactment of Section 5(2)(a) as it now stands show that the jurisdiction of the Commission shall extend—so far as carrier stockholders are concerned—only to those stockholders forming a *connecting link* between two or more separate carriers.

In the Transportation Act of 1920, Section 5(4) provided that the Interstate Commerce Commission should promulgate a plan for consolidation of carriers into a limited number of systems. Section 5(2) provided that one carrier might lawfully acquire control of another in any manner "not involving the consolidation of such carriers into a single system for ownership and operation" whenever the Commission should find it to be in the public interest.²⁶

²⁵ Appellants' Brief pages 28 to 35, 40 to 46.

²⁶ See Sharfman "The Interstate Commerce Commission," Part III A, pages 430-474. See especially pages 438 ff.

Under this Act, in *Stock of Denver and Rio Grande Western R. R.* (1921), 70 I. C. C. 102, the Commission found itself to be without jurisdiction when a "holding company," owning all the stock of one operating carrier, sought to acquire all the stock of the applicant, likewise an operating carrier, and thus become the connecting link and medium of control of the two separate carriers. The Commission declared that the proposed acquisition of stock by the holding company "does not constitute a consolidation" within the meaning of Section 5(6), and, that inasmuch as the "holding company" is not a "carrier," the acquisition of control of the "holding company" is not within Section 5(2) which only applied to acquisition of control by carriers.

B. The subsequent extension of Interstate Commerce Commission jurisdiction was intended to include non-carriers only if union of carriers be accomplished through such non-carriers.

In referring to the Denver and Rio Grande Western R. R. decision in its Annual Report for 1929 (p. 80) the Commission said that not only was that particular transaction outside the Transportation Act of 1920, but also Section 7 of the Clayton Antitrust Act did not apply because the two carriers which had been thus connected were not competing lines. Then the Commission stated that unless these non-carrier connecting companies were brought within Section 5 by an amendment to that Section that the "carefully planned scheme of public regulation, which Section 5 was designed to accomplish, is very likely to be partially or even wholly defeated . . ." (Annual Report, 1929, p. 82.)

The Commission well illustrated the activities of these non-carrier connecting companies by the Alleghany Corporation and the Pennroad Co. Using these connecting

agencies to demonstrate what had happened under Section 5 since the Denver R. R. case, the Commission said:

"Both of these companies * * * are *purely holding companies*. That is to say, the property which they own is not physical property but consists solely of the stocks or securities of other companies."

Then, in describing the extra-jurisdictional activities of these companies, the Commission said:

"In other words, common control can be effected * * * by a chain, *one vital link* in which is made up of the control exercised, directly or indirectly, over two or more corporations by individuals." (Emphasis added.) Annual Report, 1929, p. 81.

The Commission concluded the matter in its 1929 annual report by a recommendation that "consideration should now be given by the Congress to possible legislation." (*Ibid* p. 89.)

Congress acted in response to this report of the Interstate Commerce Commission in 1929 by directing its Committee on Interstate and Foreign Commerce to inquire into the situation (House Resolution 114, 71st Congress, Second Session). Pursuant to this resolution, the Congressional Committee made an extensive two year investigation and made a report on February 20, 1931, designated H. R. No. 2789, 71st Congress, 3rd Session, which confirmed the need for amending Section 5 as the Interstate Commerce Commission had recommended. Here again the attention of Congress was directed to the non-carrier *connecting* company which was beyond the jurisdiction of the Commission, and which acquired control of carriers, regardless of any plan which might be adopted by the Commission. The only change needed and the only change recommended was to bring those non-carriers which con-

needed carriers under Section 5 so that the Interstate Commerce Commission might work effectively towards its goal of consolidation of carriers into systems. That was the objective pointed out to Congress and that was the setting for the subsequent amendments to Section 5 adopted by Congress. See again H. R. No. 2789, 71st Congress, 3rd Session, pp. xiv-xv.

Following this investigation and also under House Resolution 114, "A bill to amend Section 5 of the Interstate Commerce Act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes" was discussed before the Committee on Interstate and Foreign Commerce. This bill, proposing certain amendments to Section 5, was H. R. 9059, 72nd Congress, 1st Session (1932) and is set forth in Appendix E hereof. Extensive hearings were held concerning this bill.

The following quotations are taken from the record of those hearings.²⁷

"The new provisions have to do with bringing the railroad holding company, in so far as its activities affecting consolidation are concerned, within the jurisdiction of the Commission. That language at first, looks a little complicated, but when you study it I think you will agree, as we have all agreed, that it is rather simple and goes directly to the object, that is, bringing the holding companies under the jurisdiction of the commission, for what purpose? Merely in so far as their activities affect the CONSOLIDATION of railroads." (Emphasis added.)²⁸

²⁷These quotations are taken from United States Government Printing Office pamphlet 195084 entitled "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives Seventy-second Congress, First Session on H. R. 9050."

²⁸Wed., Feb. 17, 1932 (page 19) Mr. Walter Splawn (Special Counsel for the Interstate & Foreign Commerce Committee, under H. R. 114, now a member of the Interstate Commerce Commission).

Commissioner Eastman, whose studies and proposals led to the legislation in question, appearing before the Committee on Interstate Commerce on February 23, 1932 (72nd Congress, First Session) H. R. 9059, in explaining the necessity for the control clause which was added to Section 5(2)(a) by the amendment of 1933, said:

"The new paragraph (4)²⁹ on page 2 is a substitute for the present paragraphs (2) and (6). It proposes to authorize, under Commission supervision, every legitimate and desirable method of combining railway properties, including consolidations, mergers, purchases, leases, operating contracts and acquisitions of stock control of carriers by other carriers and also by a *single holding company*.

"Now, that last method of acquisition by a single holding company is the only one which personally I believe is not included in the present provisions. It would not offend me if it were omitted. It was put in, and I think I was responsible for putting it in, because of the chapter in House Report No. 2789 of Professor Bonbright entitled 'Shall the Railway Holding Company Be Outlawed?' He made a good argument to the effect that union *through a holding company* might at times be desirable" (Emphasis added.)³⁰

.

"The one designated (c)²⁹ beginning on page 3 is a new provision. The necessity for it arises because it seemed desirable to provide in paragraph (4) for possible approval by the commission of a method of putting two or more railroads together through the *medium* of a single holding corporation. I think I said last Friday that the reason why I thought that

²⁹See Appendix E.

³⁰Tues., Feb. 23, 1932 (page 55) Hon. Joseph B. Eastman, Commissioner, Interstate Commerce Commission. See footnote 27 last above.

ought to be included was because Professor Bonbright in the chapter which he wrote for House Report 2789, entitled 'Shall the Holding Company be Outlawed?' made a very good argument for the use of a single holding company, to bring about a union of railways under certain conditions.

"I question whether adequate occasion * * * for such a method could be shown *except in rare instances*, but it is conceivable that this could be shown." (Emphasis added.)³¹

These explanations on the part of Commissioner Eastman are not in accord with an interpretation of the control clause which would make it apply not "in rare instances" but in a great number of transactions coming before the Commission³² and which would make it apply not to the case of "a single holding corporation" but back through a line of corporate investors until it should stop with some individual stockholder.

That this was deemed an important consideration by those who framed the legislation in question is apparent from Commissioner Eastman's reply to a question of Mr. Huddleston at the hearings:³³

"Mr. Huddleston: * * * May I ask what you would think of the effect of a provision forbidding the ownership of the stock of a carrier corporation, by another corporation and requiring that the stock be owned by individuals, and each share to have equal voting power and without power to pool or intrust it."

³¹Pages 59-60 of the same hearings. See footnote 27 last above.

³²In appellants' jurisdictional statement it is said: "From an administrative standpoint also, it is important that this issue be finally determined, for an authoritative determination will affect a large number of applications now pending under Section 5 (2) (a) before the Commission."

³³Friday, Feb. 19, 1932, page 53 of the same hearing. See footnote 27 above.

"Commissioner Eastman: 'Why, I am not prepared to recommend that, Mr. Huddleston. Of course, that goes considerably beyond what is proposed here, and I should suppose that that would interfere with the holding of stock in railroads by a good many corporations where there might be no possible objection to such holdings. It might interfere with holdings by banks, or by charitable organizations, or by strictly investment companies, and so on.'"

.

"Mr. Mapes: ". . . I want to make sure that I correctly understand what the bill tries to do. As I understand it, the Interstate Commerce Commission, under existing law, *had no control* over holding companies not common carriers, of the stock in common carriers, and this bill, among other things, is to *give the Interstate Commerce Commission control over such holding companies that acquire the control of the stock of TWO OR MORE RAILROADS.*"

"Commissioner Eastman: 'Yes, that is, the intention of the bill is to put under the jurisdiction of the commission the *combining* of railroad properties *through the medium* of a holding company. It also provides that *if such a combination through a holding company* is permitted, then that holding company shall come under the jurisdiction of the commission . . .'" (Emphasis added.)"

These same thoughts and purposes were again expressed by the Interstate Commerce Commission in its Annual Report of 1932, which came on the eve of actual remedial legislation by Congress. The Commission again recom-

²⁴Wednesday, March 23, 1932 (page 255) Hon. Carl E. Mapes (Congressman on the Committee of the House of Representatives on Interstate and Foreign Commerce). See footnote 27 above.

mended that Section 5(2) of the Interstate Commerce Act be amended so as to—

“(c) Provide that if *union* through a single holding company is authorized, the Commission shall have jurisdiction over the capitalization of that company and power in its discretion, to regulate its accounting, inspect its books and records, and require reports.” (Emphasis added.) Annual Report, 1932, p. 101.

It was these investigations, hearings and recommendations which formed the basis and background for the legislation of 1933. Following the studies and hearings and recommendations it was declared in House Report No. 193 (73rd Congress, 1st Session), pages 19-20:

“The investigation under House Resolution 114 (House Report No. 2789, 71st Congress, 3rd Session) discloses that an important weakness of Section 5 as it now stands is that it places no control upon the activities of so-called ‘holding companies’ in *effecting unification* of railway properties in a system. . . .

“... The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest.” (Emphasis added.)

The result was the rewriting of Section 5 of the Interstate Commerce Act by the enactment of the Emergency Railroad Transportation Act of 1933, c. 91, 48 Stat. 217, 220.³⁵

³⁵See Sharfman “The Interstate Commerce Commission” Part III-A, page 494ff.

C. The Emergency Railroad Transportation Act of 1933 accomplished the purpose of including non-carriers within the Commission's jurisdiction if such non-carriers formed a connecting link between carriers.

Significantly the 1933 Act expressly prohibited³⁶ all combinations of carriers except such as were accomplished by one of the means authorized by the statute. Having prohibited all other combinations, Congress deemed it desirable in 1933 to make available numerous and varied means of combining carriers, from which could be chosen the method most suitable to each particular transaction. Accordingly paragraph (2) of old Section 5³⁷ was repealed and in substitution therefor paragraph (4) of Section 5 was adopted.³⁸

Under Section 5 as thus amended the Commission was for the first time expressly given jurisdiction of a property purchase by one carrier from another,³⁹ and there also appeared for the first time the two non-carrier clauses.⁴⁰

Regardless of the method adopted for combining, Congress in 1933 intended the Commission to have complete

³⁶Section 5 (4) of the Emergency Railroad Transportation Act of 1933.

³⁷Section 5 of the Transportation Act of 1920.

³⁸Section 5 (4) as amended by the Emergency Railroad Transportation Act of 1933 provided

"* * * it shall be lawful with the approval and authorization of the Commission * * *" for "two or more carriers to consolidate or merge their properties * * * into one corporation * * *; or for any carrier * * * to purchase * * * the properties * * * of another; or for any carrier * * * to acquire control of another through purchase of its stock; (and then to remedy the situation brought about by the Denver R. R. decision, the following two non-carrier clauses appeared) or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock." (Emphasis added.)

³⁹See Type A, classification 2, on page 6 hereof. See discussion in note 246, page 445, Sharfman, Part III A.

⁴⁰See Type B of outline on page 6 hereof.

jurisdiction over all the links in the combination and desired to frame its legislation accordingly. Two types of transactions were authorized by the 1933 legislation—those by carriers and those where a non-carrier would be a connecting link. Carriers were already subject to the Commission's jurisdiction and therefore it was not necessary to add any jurisdictional clause as to them. But the non-carrier connecting links prior to 1933 were not within the jurisdiction of the Interstate Commerce Commission and therefore it was necessary to include the clause⁴¹ now known as Section 5(3) which extended the jurisdiction of the Commission to "a person which is not a carrier * * * authorized, by an order entered under paragraph (2), to acquire control of any carrier⁴² or of two or more carriers." Thus, by reference to the new non-carrier control clause the jurisdiction was extended to, but only to, the non-carrier *connecting link*. The Denver Railroad case was thus ruled out by Congress. The Interstate Commerce Commission's plan for orderly unification of carriers into systems could not now be defeated, for now its jurisdiction embraced those connecting agencies which affected control of two or more carriers through stock ownership.

A substantially similar provision for combining motor carriers was included in the Motor Carrier Act of 1935 as Section 213 thereof.⁴³

⁴¹Section 5(3) as amended by the Emergency Railroad Transportation Act of 1933.

⁴²"A person which is not a carrier * * * authorized, by an order entered under paragraph (2), to acquire control of any carrier * * *" would mean a person already controlling one carrier and seeking to acquire control of another carrier by stock ownership or otherwise.

⁴³See Appendix F hereof.

- D. Transportation Act of 1940 merely enlarges the number of available statutory methods for combining carriers, as evidenced by (a) House Conference Report No. 2832, and (b) Senator Wheeler's explanations.**

Almost as an afterthought Section 5(4) of the Emergency Railroad Transportation Act of 1933 was changed by the Transportation Act of 1940,⁴ and the words "or otherwise" were added to the non-carrier control clauses. The old Section 5(4) was renumbered as 5(2)(a).

It had been found, prior to this 1940 amendment, that other desirable methods of combining carriers were useful but could not be approved. It was in order to relieve this situation that the words "or otherwise" were added. Experience having shown that the methods of combination provided for in 1933 were not sufficient, Congress in 1940 merely increased the number of means available for putting carriers together.

That this was the sole objective of the addition of the words "or otherwise" appears from the only statement which has been found regarding this last addition. This is found in House Conference Report No. 2832, August 7, 1940, 76th Congress, 3rd Session, p. 68, where it is simply said:

"1. Paragraph (2) is changed by adding the words 'or otherwise' in several places, so that the acquisition of control by methods other than true ownership of stock is authorized with Commission approval."

⁴Section 5 was revised so as to make it apply to all types of carriers subject to the Interstate Commerce Act. As a necessary incident, Section 213 of the Motor Carrier Act of 1935 was repealed.

In this same connection it is important to note that Senator Wheeler, as Chairman of the Senate Committee on Interstate Commerce, after passage of the Transportation Act of 1940, which made the minor changes in Section 5(2)(a) we have before considered, asked to insert in the Congressional Record a statement⁴⁵ giving certain explanations of the amendment to the Interstate Commerce Act. In support of his request for this insertion, he observed:⁴⁶

"* * * I desire to have these explanations in the RECORD because I feel that they would be helpful to the Interstate Commerce Commission in interpreting various provisions of the Act."

In considering the contention of appellant that the words "or otherwise" in effect made Section 5(2)(a) into a holding company statute, the statement of Senator Wheeler assumes particular importance because Senator Wheeler was the sponsor of the Public Utility Holding Company Act of 1935, was particularly interested in holding companies, and actually did propose a bill whereby the control of carrier holding companies would have been subjected to detailed regulation by the Commission.⁴⁷ But Senator

⁴⁵Senator Wheeler's statement as to the 1940 amendments to Section 5 is quoted in Appendix G hereof in full, simply to show the general intent of the amendments and to show the fact that the Senator did not consider the words "or otherwise" of sufficient importance to warrant an explanation.

⁴⁶86 Cong. Rec. 11678 (1940).

⁴⁷The carrier Holding Company Act introduced by Senator Wheeler was S. 2016, 76th Congress, 1st Session. It expressly applied to a stockholder of only one carrier. See its definition of a "carrier holding company" as quoted in Appendix H hereof. The bill appears to have died in the Senate Committee. It closely followed the pattern of the Holding Company Act of 1935 and adopted verbatim some of its provisions. In its proposed Section 5a it would have expressly prohibited an existing railroad holding company from acquiring any interest in even one carrier, including its subsidiaries, without the prior approval of the Commission. It also would have prohibited any individual from acquiring control of a

Wheeler in his statement said absolutely nothing about the words "or otherwise." He did not consider them of sufficient importance to warrant an explanation or any comment whatsoever. Surely he would have mentioned the words "or otherwise" in his statement had they been intended to be interpreted in any such manner as appellants here contend.

If Congress in 1940 had intended to make the carrier control clause of Section 5(2)(a) as far reaching as protestants contend, it certainly would have explicitly so provided, as did Senator Wheeler's bill which failed of enactment.

Furthermore, if Congress had intended to subject an owner of stock of only one carrier to the jurisdiction of the Interstate Commerce Commission, it would have done so in a manner different than that of merely adding "or otherwise" to various clauses in Section 5(2)(a). The effect of those words, even under appellants' contention, is insufficient to accomplish that which they claim to be the Congressional objective, namely, to extend the Commission's jurisdiction to a stockholder of a single carrier. Under appellants' theory the Commission could not insist upon jurisdiction over the stockholder of a carrier. Suppose Refiners had acquired the Marshall property prior to the sale of Refiners stock to Union Tank Car Company. Under such facts the Commission admittedly would have no jurisdiction of Union under appellants' contention. Yet

carrier or carrier holding company. The bill, moreover, contained a lengthy preamble specifically declaring its purpose to regulate and control the transactions of such holding companies. Such a preamble was no doubt considered advisable to avoid any question of constitutionality because a question had been raised as to the Congressional authority under the commerce clause of the Constitution of the United States to regulate a stockholder only. See pages 6-7 of House Report No. 2789, 71st Congress, 3rd Session.

there is as much reason for having jurisdiction under the assumed facts as there would be in the case at bar. Whether or not the Commission would have jurisdiction under appellants' contention is left entirely to the carrier and its stockholder. If the carrier does not choose to propose a purchase from another carrier, the Commission would have no jurisdiction of the stockholder. Even if the carrier proposed such a purchase, the Commission would have no jurisdiction of the stockholder if the stockholder did not choose to become a party applicant, and the purchase was abandoned. Had Congress intended to give the suggested jurisdiction it would have done so in such manner as to give jurisdiction whether or not the carrier ever sought to purchase the properties of another carrier and would not have left the matter of jurisdiction in the control of the parties. Thus it is seen that appellants' theory is unsound because it "proves" too little."

So far as the history of the legislation is concerned, the express purpose of the Act was solely to plug a loophole through which two or more corporate carriers could be combined by means of a "holding company" without resorting to the Commission for approval. This was specifically announced in House Report No. 193 (73rd Congress, First Session) at page 19. (See quotation therefrom on page 23 hereof.) The aim was to bring this connecting agent (even though a non-carrier) within the jurisdiction of the Interstate Commerce Commission when it acted to form a *connecting link* between two or more separate carriers through ownership of their stock or (by the amendment of the Transportation Act of 1940) when it acted to form a *connecting link* between two or more separate carriers through any other lawful means. See-

"Appellants' theory also "proves" too much, and thereby also demonstrates that it is unsound. See discussion on page 43 hereof.

tion 5(4) as it stands today was enacted to bar the practice of combining carriers by a means which formerly was not subject to Interstate Commerce Commission approval." The words "or otherwise" were not intended to convert the Interstate Commerce Act into a carrier holding company act.

E. Section 5(2)(a) of the Interstate Commerce Act differs significantly from the Public Utility Holding Company Act of 1935.

If Congress had intended Section 5(2)(a) to be mandatory, and that a stockholder of a carrier must be a party applicant when that carrier seeks to purchase another carrier, Congress would have expressed that policy more definitely, as it did in the *Public Utility Holding Company Act of 1935*.⁵⁰

Congress in the Public Utility Holding Company Act very clearly and definitely provided, in short, that (A) "any company" owning or controlling 10% of the voting stock of *even one* public gas or electric utility company, and (B) "any person which the Commission determines" directly or indirectly to exercise a controlling influence over *even one* public gas or electric utility company must be subjected "to the obligations, duties, and liabilities imposed in this chapter upon holding companies." U. S. Code, Title 15, Section 79b(a)(7)(A) and (B): (Certain exceptions are considered at page 33 herein.)

The provisions of the Holding Company Act were expressly made to cover *any* company owning 10% of the

⁴⁹Section 5(4) provides: "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof * * *."

⁵⁰U. S. Code, Title 15, Section 79. See Appendix I hereof.

stock of even *one* public utility and *any* other person the Securities and Exchange Commission should determine to exercise a controlling influence over even one public utility—all to be *ipso facto* within the terms of that Act. By contrast, there is no such language in the Interstate Commerce Act. Certainly, if Congress had intended the Interstate Commerce Commission to assume jurisdiction over the stockholder of even one carrier as it intended the Securities and Exchange Commission to have jurisdiction over the stockholder of even one public utility, then Congress would have expressed that intent with equal clarity in the Interstate Commerce Act. But no such provision was inserted by either the 1933 or 1940 amendments to the Interstate Commerce Act.

The differences in statutory language between the Holding Company Act and Section 5 of the Interstate Commerce Act are so sharp that we are assured that Congress recognized and desired to guard against distinctly different types of matters, and to provide entirely different types of remedies, in the field of carriers as compared to the field of public utilities.⁵¹

In the case of carriers the only objective of the Congressional investigations and the recommendations of the

⁵¹In the case of public utilities the undesirable element was the "desire of engineering and manufacturing groups to secure control of the maximum number" of public utilities in order to "sell commodities and services" to them, and "the desire of bankers to dominate utility managements in order to secure promotion and underwriting profits" resulting in the "formation of unwieldy systems of holding companies which could not possibly be justified on grounds of engineering and managerial efficiency." See Bonbright & Means, "The Holding Company," pp. 91-93. This resulted in unsound financial structures and was followed by the practices of milking operating companies through numerous forms of contracts and arrangements. Federal Trade Commission, "Utility Corporations," 70 Congress, First Session, Senate Doc. 92, Part 73-A (1935) 61, 65. These practices have been brought in check by the Holding Company Act of 1935. See U. S. Code, Title 15, Section 79a.

Interstate Commerce Commission, as pointed out above, was to bring within the jurisdiction of the Commission the non-carrier connecting company which acted as a *connecting link* between carriers and therefore was the means of *binding together* carriers without the Commission's approval.

The position urged by protestants is in effect that the 1940 amendment made Section 5 into a carrier Holding Company Act. This would have effected a fundamental change in policy. The change in policy would have been as broad as that effected by the 1933 addition of the non-carrier provisions, and would have been a change in policy as fundamental in the carrier industry as was the Public Utility Holding Company Act in the utility field. Such a far-reaching change would not have been adopted lightly, with practically no discussion at all.⁵²

Had it been the Congressional desire to inaugurate such regulation of stockholders of carriers, it would have held hearings and conducted other investigations. But it did not hold any hearings or conduct investigations concerning such stockholder in 1940 or at any other time. Even the

⁵²Before adopting any "holding company" legislation as to carriers Congress would have heeded the words of Mr. Walter M. W. Splawn, Special Counsel for the Interstate and Foreign Commerce Committee directing investigations of carrier "holding companies" under House Resolution 114 and now a member of the Interstate Commerce Committee, who said:

"If Federal regulation of the holding company is necessary, the reasons for that necessity should be clear, the evils to be remedied should be apparent, and the scope and the limits of desired and possible Federal control should be clearly set forth. Necessary protection should be afforded, in so far as it is possible under Federal regulation, to those who would otherwise suffer *without interfering with or placing undue burden upon legitimate and desirable business activity*. Formulation of such legislation will require a comprehensive and prolonged study." (Emphasis supplied.) (House Report 2789, 71st Congress, Third Session, page LXXXVII.)

hearings and investigations conducted prior to the 1933 legislation concerned only such stockholders as held stock of two or more carriers and thereby formed a connecting link. The 1940 amendment could only have been designed to make available additional lawful methods for combining. It is not reasonable to believe that Congress intended any startling policy change in the Interstate Commerce Act to be effected by simply adding "or otherwise" to the Act in 1940,—a two-word amendment which Congress apparently did not even discuss. The words "or otherwise" must be taken to concern *only connecting companies* which are the means of tying together *two or more carriers* through ownership of their stock or through some other lawful means.

F. Even under the Holding Company Act of 1935, Union Tank Car Company would not be subject to the jurisdiction thereby conferred.

It is significant that even in the Utility Holding Company Act where the stockholder of even one public utility was within the scope of the Act, an exception is made when:

"Such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company; . . . " *U. S. Code, Title 15, Section 79c(a)(3).*

Thus, Congress has expressly said in the Holding Company Act that it is not interested in a corporation which is only "incidentally a holding company." The Interstate Commerce Commission,⁵³ Congressional leaders and other sponsors of the 1933⁵⁴ and 1940 legislation also indicated they were not interest in a company which was "only incidentally a holding company."⁵⁵

According to the findings of the Interstate Commerce Commission in the instant case, Union is only incidentally a stockholder of Refiners (R. 56). Its principal business is renting tank cars and the material part of its income is derived from that business. The conclusion must be that even if Union could be designated a "holding company" it is clearly not such a "holding company" as Congress had in mind,—even under the Public Utility Holding Company Act.

⁵³See definition of "holding company" quoted on page 18 hereof from page 82 Annual Report 1929, Interstate Commerce Commission.

⁵⁴See quotation from Mr. Eastman's testimony on pages 21-22 hereof.

⁵⁵See also quotation from Mr. Splawn's recommendation, footnote 52.

II.

**THE DISTRICT COURT CORRECTLY HELD THAT THE CARRIER
CONTROL CLAUSE DOES NOT GOVERN A TRANSACTION
PLAINLY FALLING WITHIN THE PROPERTY
PURCHASE CLAUSE**

- A. Pertinent provisions of Section 5 taken together show that a property purchase does not fall within the carrier control clause.**

Refiners Transport & Terminal Corporation, a carrier, and Marshall Transport Co., Inc., another carrier, have made their application under Section 5(2)(a). The application falls squarely within the letter of Section 5(2)(a) which says that it shall be lawful "for any carrier . . . to purchase . . . the property . . . of another" carrier. The application filed by the carriers involved falls squarely within the letter of Section 5(2)(b) which says ". . . carriers . . . seeking authority . . . shall present an application to the Commission."

Appellants would have the Court ignore the property purchase clause.⁵⁶ They say that "the issue here turns . . . upon the construction of the non-carrier control clause of Section 5(2)(a)." It does not depend upon that clause alone. Neither does it depend upon the word "control" alone. The issue turns as well as upon the con-

⁵⁶Notwithstanding that there are five distinct clauses in Section 5(2) (a) (i), appellants would ignore all of the clauses except the carrier control clause. For example, they say, (pages 19-20 Appellant's Brief): "Plainly, if a stock purchase had been involved, it could not be questioned that Union would have secured control of Marshall whether Union purchased Marshall's stock directly, or through its corporate subsidiary, Refiners." This is not correct. Section 5(2) (a), clause A-3 of outline on page 6 hereof, expressly authorizes a carrier to acquire control of another carrier by stock purchase.

struction of the property purchase clause and all pertinent words and provisions of the Interstate Commerce Act read as a comprehensive whole.

Viewed from established familiar concepts there is no internal conflict in the language of the statute and no monstrous absurdities, and it must be presumed that Congress intended the language of the Act to be construed according to its plain meaning.⁵⁷

The words of the Associate Justice Robb are pertinent where, in speaking of another Act of Congress, he said, "In our view, the relief act is free from ambiguity, and effect should be given to its plain terms." *Wilbur v. U. S. ex rel. C. L. Wold Co.* (1929), 30 Fed. (2d) 871, 872.

Appellants disclaim the plain meaning of the congressional words in the property purchase clause and seek to impose their own interpretation of the Act upon the public by suggesting a meaning which at best is hidden and which, if adopted, would create ambiguity and confusion where none in fact exists. That this has caused appellants confusion is apparent from the different theories urged in support of their contention.

When opposition first developed to the purchase of Marshall property by Refiners, it was upon the theory that the majority stockholder was the proper and only party who could make the application. Protestants said at page 5 of their brief before Division 4:

"When the non-carrier owner of an existing motor truck concern aspired to embrace another or

⁵⁷ *Spano v. Western Fruit Growers* (1936), 83 Fed. (2d) 150.

U. S. v. Katz (1926), 271 U. S. 354; 70 L. Ed. 986.

Crompton & Knowles Loom Works v. White (1933), 65 Fed. (2d) 132.

White v. Hopkins (1931), 51 Fed. (2d) 159.

Schroeder v. Davis (1929), 32 Fed. (2d) 454.

several more within its domain, it, as the real party in interest, must be the one to approach the Commission for needed authority * * *. Similarly, if it be a carrier already owning another which wishes to acquire a third, it is the dominating ultimate owner of the first whose domain is sought to be extended. It therefore is the proper party in interest and is the one which should approach the Commission."

The Commission did not adopt this theory, and apparently it has now been abandoned. The position here taken by appellants is that an application for *control* under the carrier control clause must be filed by Refiners' stockholders *in addition to* the application by Refiners itself under the *property purchase* clause.³⁸ See pages 18-20 of appellants' brief.

There is not a word in the statute or in the history of the legislation to support any of appellants' theories. Section 5(2)(a) provides that "it shall be lawful" for one carrier to purchase the property of another carrier upon approval of the Interstate Commerce Commission or,— (note the disjunctive)—, "or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through stock ownership or otherwise." And to make this meaning doubly clear, Section 5(2)(b) provides:

"Whenever a transaction is proposed under subparagraph (a) a *carrier or carriers or person* seeking authority therefor shall present *an application* to the Commission * * *."

³⁸That confusion results from appellants' position is further manifested by the decision of Division 4 in *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*. See page 44 hereof.

Undeniably, the statute provides for but one application to the Commission—and that to be made either by the carrier or by the non-carrier person which proposes one of the permissible transactions under Section 5(2)(a). The statute indicates that the carrier control clause was intended as a distinct and additional method of combining two or more carriers. It was not intended to be made use of in conjunction with one or more of the other permissive clauses of Section 5(2)(a).

The author of the majority opinion of the Commission states (R. 30):

“There can be no more direct or positive manner of obtaining control than by outright purchase. It is inconceivable that the outright purchase of another company's franchise and properties through the medium of the already owned subsidiary would have been exempted while the mere purchase of stock control of the other company through the same subsidiary would activate the statute.”

See also appellants' brief, pages 19-20.

Rather than being inconceivable, this is admittedly what was done by Congress by the amendment of 1933. This amendment did not contain the words “or otherwise” and clearly activated the statute only in the case of an acquisition of control through stock ownership.

What is really inconceivable is that Congress, by addition of the words “or otherwise” in the amendment of 1940, should have intended to authorize an acquisition of property of another carrier by a non-carrier. A non-carrier could not conceivably use such property unless it itself went into the trucking business. The carrier control clause does not authorize the purchase of the assets of a carrier. Why should it? Take the Union Tank Car Company, for

instance. It is not proposing to acquire any property. It is not engaged in the trucking business. It has had no experience in such a business nor any facilities or personnel for carrying it on. If it were to receive the trucks or operating rights of Marshall, what would it do with them?

It is no answer to say that use can be made of the property by having a subsidiary motor carrier make a simultaneous application for authority to purchase. It is too far fetched to say that the practical application of the control clause was intended to be made dependent upon a further application under other permissive clauses of the section.

The various permissive clauses of the statute on their face are in the alternative and no one of them is made dependent upon the exercise of any other. The whole history of the control clause shows that it was intended to fill a gap in the statute which permitted two or more carriers to be combined in a common interest without any recourse whatever to the Commission for authority. A transaction where the purchase clause must also be invoked does not come within that gap.

Appellants, on pages 22-23 of their brief, attempt to inject the familiar principle that the Commission's findings on matters of fact are binding and cannot be disturbed by the courts. This principle has no application here. The Commission found no special or extraordinary facts. The record shows no relationship between Refiners and Union other than that which normally exists between a corporation and its stockholders. The Commission rested its decision solely upon the meaning which it concluded the statute itself and *Rochester Telephone Corp. v. United States*, 307 U. S. 125, give to the word "control." That is purely a legal as distinguished from a factual question.

No matter how broad were the generalities which were used to define control, they were clearly not designed to make the carrier control clause so vague and indefinite as to be meaningless, and could not have been intended to do away with fundamental corporate relationships. It surely was not intended to have a hidden meaning which would distort an ordinary purchase transaction.

Whatever may be the definition of control, it cannot change the meaning of other words in the statute, and cannot change the identity of that which is controlled, namely, a second carrier.

The carrier control clause does not apply to a property purchase, such as is here involved.

It is to be noted that in the property purchase clause the subject of acquisition is *property*, whereas in the carrier control clause the subject of acquisition is *carrier*. The distinction is fundamental. The "control" clause does not apply unless a *carrier* is the subject of acquisition.

The meaning of the word "carrier" as here used is defined in the statute itself. Section 5(13) expressly declares that as used in paragraph 2 of Section 5, the term "carrier" means a carrier subject to Part I, Part II or Part III. In each Part,⁵⁹ a "carrier" is defined as being (1) a "person" who is (2) "engaged in transportation" of one form or another. Accordingly, the carrier control clause in effect declares, considering these definitions, that it relates only to transactions in which it is proposed to acquire control of two or more *persons* engaged in transportation. To be within the carrier control clause, the subject of the proposed acquisition must be a *person* engaged in transportation.

⁵⁹Section 1(3)(a) of Part I, Section 203(a)(14) of Part II, and Section 302(d) of Part III.

Contrary to the claim on page 20 of appellants' brief, the use of the words "or otherwise" in Section 5(2)(a) confirms this interpretation. Borrowing the words of the Supreme Court, " * * * following a well-known rule of construction, we must rather suppose its association (that is here, the association of the phrase 'or otherwise') was intended to confine it to acts or conduct having the same purpose as its associates."⁶⁰ Applying this rule to the carrier control clause, it is to be noted that it states "it shall be lawful to acquire control of two or more carriers *through ownership of their stock or otherwise.*" The control to which reference is here made means control of *two* or more *carriers* through stock ownership or control of *two* or more *carriers*, that is, persons, by *means similar to stock ownership.*⁶¹

Here no control is sought over the "person" Marshall individually, or of the "person" Marshall corporation. No "person" is being acquired, consequently no carrier is being acquired, and therefore the subject of acquisition is not a carrier. There is no second carrier of which Refiners or Union Tank Car Company would have control. But one carrier continues, that is, Refiners Transport & Terminal Corporation. It follows that the proposed transaction is not within the carrier control clause.

It is apparent that Congress itself has distinguished between "properties" and "carriers" as a *subject of acquisition*.

⁶⁰This statement of a familiar rule of statutory construction is taken from the opinion of the Supreme Court of the United States in *U. S. v. P. R. Company*, 242 U. S. 208, 229, 61 L. Ed. 251, 264.

⁶¹No court decision has been found interpreting the exact phrase " * * * control * * * through ownership of * * * stock or otherwise." However, the meaning of somewhat similar clauses was determined in *Pullman Palace Car Co. v. Missouri Pacific Ry. Co.* (1885), 115 U. S. 587, 29 L. Ed. 499, 6 S. Ct. 194, and *Toledo Traction Light & Power Co. v. Smith* (1913), 205 Fed. 643.

tion, and it cannot be said that a distinction made by Congress is unduly legalistic.

Appellants' only reply is to claim (page 26 of the appellants' brief) that "the Act is concerned primarily with whether the *company to be acquired* is a carrier at the time the transaction is proposed, not whether it will be technically a carrier when the transaction has been carried to fruition." This merely begs the question. It assumes that a "company" is "*to be acquired*." That is not true here. Neither *at the time of proposing the transaction*, nor at any other time, is the subject of acquisition a company or a person. No "company"—no "person"—is to be acquired. Only *property* is to be acquired here. Thus the Commission here has no jurisdiction under the carrier control clause because the subject of acquisition is property and is not a carrier at any stage of the transaction. Moreover, this proposition does not defeat the jurisdiction of the Commission under the property purchase clause. Jurisdiction under the property purchase clause does not depend upon the *subject of acquisition* being a carrier. The jurisdictional requirements of the property purchase clause are satisfied in that both the seller and purchaser are carriers.

The transaction proposed involves for transfer only "properties" and clearly falls directly within the clause relating to property purchase as found in the opinion adopted by Division 4 and the District Court.

B. Appellant's contention results in chaotic confusion.

That appellants' contention is unsound is demonstrated by the paradox that it "proves" both too much and too little.⁶² If the word "control" and the statutory definitions thereof were meant to have any such meaning as appellants urge, then it is not sufficient to have only the corporate purchaser's majority stockholder join in the application. The directors would also have to join in the application because they have "actual as well as legal control."⁶³ In the case at bar, it is to be noticed that Messrs. Turner, Yokom, Lathrop and Crawford had worked together for years and had in fact built the business to a point where Union Tank Car Company was willing to invest its money in their enterprise.⁶⁴ They still are minority stockholders, and constitute a majority of the Board of Directors and actually manage and carry on the corporation's business. If appellants' contention were sound, this group as well as Union would have to file an application. They have "actual as well as legal control." And if the corporation had a general manager, he too should be an applicant because he would have "actual as well as legal control."

Furthermore, Union Tank Car Company is a corporation "controlled" by its Board of Directors, and that board directs the manner of voting Union's stock in Refiners. And Union's board is elected by its stockholders. And so if appellants' contention were sound, the directors

⁶²That appellants argument "proves" too little is seen from the consideration that even if appellants' theory were correct, Section 5 would be insufficient as a carrier holding company act. See discussion on pages 28-29 hereof.

⁶³*Rochester Telephone Corp. v. U. S., supra.*

⁶⁴See Appendix A hereof for history of Refiners Transport & Terminal Corporation.

of Union Tank Car Company and persons owning a majority of its stock would also have to join in the application. And if any of those stockholders were corporations, their directors and stockholders would also have to be applicants. And so on, *ad infinitum*.⁶⁵

The confusion arising out of the position urged by appellants is further illustrated by *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*, decided January 12, 1944.⁶⁶ In offering a distinction between that case and the Commission's decision in the case at bar in the concurring majority opinion, it is explained that in the Burlington case the corporate purchaser's stockholder is a carrier over whom the Commission already had jurisdiction, whereas in the Refiners' case the purchaser's stockholder is not a carrier. Logically this should make no difference.⁶⁷

⁶⁵See dissenting opinion of Commissioner Porter in *Burlington Transportation Company—Purchase—Chicago, Burlington, Quincy Railroad Company*, Appendix J. hereof.

⁶⁶The pertinent parts of the Burlington case are quoted in Appendix J hereof.

⁶⁷The rule made by the Commission on September 17, 1943, after it had decided the case at bar makes no such distinction. The rule states: "Parties to application. If the applicant for said authority is controlled * * * within the meaning of Section 1(3) (b) of said Act, by any person or persons, each such person shall also execute and become a party to said application * * *." 8 Fed. Reg. 13193-94.

Even though the purchaser's stockholder is a carrier, the transaction under appellants' contention would constitute an acquisition of control falling within the clause of Section 5(2) (a) which makes it lawful for " * * any carrier * * " to acquire control of another through ownership of its stock or otherwise." That transaction cannot be distinguished from the one at bar. Here the purchaser's stockholder is a non-carrier, and appellants contend that the carrier's stockholder would fall into the clause of Section 5(2) (a) making it lawful for a "person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." The two clauses are identical, except that one relates to a carrier and the other to a non-carrier. (Footnote continued on next page.)

The concurring majority opinion in the Burlington case in effect frankly explains that in the case at bar, *in order to give the Commission jurisdiction over the purchaser's stockholder*, it was necessary to interpret a property purchase as being within the carrier control clause; that is to say, the "end justified the means." The same argument is also made in Appellants' Brief, pages 22-23.

But the Commission cannot by this process extend its own jurisdiction. It is the province of Congress to confer and state the jurisdiction of the Commission. The Interstate Commerce Act gives jurisdiction over a non-carrier if that non-carrier is a connecting link between carriers. This being the limit of the Commission's jurisdiction, it cannot extend it by the distorted construction of calling a property purchase a carrier control transaction. Section 5(3) confers jurisdiction upon the Commission as a *result* of a transaction being within the carrier control clause. It is not a *reason* for a transaction being within that clause.

Appellants similarly "put the cart before the horse" on page 23 of their brief. The fact that the Commission would have some discretion under Section 5(3) as to whether or not it would exercise jurisdiction, if it had jurisdiction, does not confer jurisdiction.

Thus, whether or not the purchaser's stockholder is or is not a carrier should make no difference in the results, under appellants' contention.

Furthermore, even though the purchaser's stockholder is a carrier, it would be, under appellants' contention, controlled by its majority stockholder who would have "actual as well as legal control" of two or more carriers and who therefore should be required to be a party applicant under appellants' contention. Each one of these corporations is also controlled by its directors and executive officers who also under appellants' contention have "actual as well as legal control" of one or more carriers, and therefore all of those directors and executives should also be required to be applicants under appellants' contention if it were correct.

It is urged on page 23 of appellants' brief that "there can be no more direct or positive manner of obtaining control than by outright purchase." If Congress meant for "control" to include a "purchase," why did it provide a property purchase clause?

It is also urged on page 24 and footnote 10 of appellants' brief, that because some carriers are not incorporated they cannot be "controlled" by stock ownership, and that therefore a purchase of the properties of such carriers, must fall under the "or otherwise" provision of the carrier control clause. This assumes erroneously that such transaction must fall in the carrier control clause. Such is not the case. Congress also provided the property purchase clause, and the hypothetical case suggested in the Commission's opinion quoted in appellants' footnote 10 falls within the property purchase clause, and thereby the Commission is given full jurisdiction, as is more fully discussed on pages 60-62 hereof.

The decision of this court in *McLean Trucking Co., Inc. v. United States*, No. 31, this Term pamphlet page 14, does not support the position of appellants as claimed on page 25 of their brief. The matters there mentioned as being proper for Commission consideration are no more appropriate under the carrier control clause than under the property purchase clause. The entire transaction here proposed has been as fully submitted to the Commission under the property purchase clause, as it could be under the carrier control clause.

The property purchase proposed in the case at bar is governed by the property purchase clause alone, and as pointed out in the dissenting opinion in the Burlington case,⁶⁸ to place it within the carrier control clause leads to

⁶⁸See Appendix J hereof.

unnecessary, illogical and unfortunate results such as those suggested above.

All the absurdities and confusion resulting from appellants' contention are avoided by accepting the property purchase clause as meaning just what it plainly says.

The law does not permit an absurd interpretation of a statute, especially where a perfectly clear and reasonable meaning is expressly set forth. "All laws are to be given a sensible construction"

III.

THE APPLICATION WAS FILED BY THE PROPER PARTY

(Reply to pages 37 to 47 of Appellants' Argument)

Appellants again on pages 38-39 of their brief urge the court to ignore not only the property purchase clause of Section 5(2)(a), but also pertinent words of paragraphs (2) and (4) of Section 5.

The plain words of the statute are that a property purchase is authorized by the property clause in paragraph 2(a), and the "carrier . . . seeking authority therefor" is authorized to "present an application to the Commission" by paragraph (2)(b), and any transaction proposed and consummated "as provided in paragraph (2)," is excepted from illegality under paragraph (4).

The argument of appellants is fallacious where they urge on page 39 of their brief that a stockholder of corporate

⁶⁹ *United States v. Katz* (1926), 271 U. S. 354; 70 L. Ed. 986;
Crompton & Knowles Loom Works v. White (1933), 65 Fed. (2d) 132;

White v. Hopkins (1931), 51 Fed. (2d) 159;
Schroeder v. Davis (1929), 32 Fed. (2d) 454.

carrier purchase is illegally participating in the transaction unless that stockholder also obtains approval as if under the carrier control clause. The fallacy is exposed by the Commission's own decisions, and Congressional re-enactment in 1940 of the property purchase clause exactly as it first appeared in 1933.

A. Persons charged with the administration of the Act have consistently interpreted it as holding that a corporation but not a stockholder is the proper party applicant.

Appellants are in error in stating on page 47 of their brief that the question has never been specifically raised before. In one of the many purchase applications in which were involved acquisitions by Burlington Transportation Company,⁷⁰ the question was raised as to whether or not Burlington Transportation Company should be accepted as the proper applicant. As stated in *Burlington Transportation Co.—Purchase—Hartell Truck Lines, Inc.* (1942), 38 MCC 497, 498, the Burlington Transportation Company " * * * is the wholly owned subsidiary of the Chicago,

⁷⁰The citations to the decisions concerning the Burlington Transportation Company are as follows:

Black Hills Stages, Inc.—Purchase—Black Hills Transportation Co. (1939), 25 MCC 171;

Burlington Transportation Co.—Purchase—Freeman Alverson (May 1940), 35 MCC 401;

Burlington Transportation Co.—Purchase—Corae (1941), 36 MCC 691;

Burlington Transportation Co.—Control—Denver Colorado Springs Pueblo Motor Way, Inc. (1941), 37 MCC 585;

Burlington Transportation Co.—Purchase—Hartell Truck Lines, Inc. (1942), 38 MCC 497;

Burlington Transportation Co.—Purchase—M. C. Foster, (1943), 39 MCC 197;

Burlington Transportation Co.—Purchase—Chicago, Burlington & Quincy R. R. Co. (January 12, 1944), 39 MCC

Burlington and Quincy Railroad Company which also controls, through stock ownership, the Colorado and Southern Railway Company, and, in turn, is jointly controlled through stock ownership by the Great Northern Railway Company and the Northern Pacific Railway Company." The contention that the purchaser's stockholder should have made an application was disposed of summarily as follows:

"* * * Protestants motion for dismissal of the application on the grounds it was not made by the real parties in interest is denied" ¹¹ (*Ibid*, p. 503.)

Also in the *Weismaster case*, 35 MCC 347, it was held by Division 4 that a corporation and not its stockholders should make the application.

As another example of the construction long and consistently placed on the Act by Division 4, which was charged with the administration of the Act, consider *System Freight Service—Merger—Yakima Valley Motor Freight*, 38 MCC 729, decided unanimously on December 4, 1942, just a few weeks before the decision of Division 4 in the case at bar. In the *System Freight Service* case it was found that the applicant—

"is now controlled through ownership of 79½% of its outstanding capital stock by Sysco, Inc., a California Holding Company which has an option to purchase the remainder of the stock * * *."

Despite this express finding of control by a non-carrier *pure holding company*, no application was required from that holding company.

¹¹The matter was again raised in the *Burlington Transportation Co.—Purchase—Chicago, Burlington & Quincy Railroad Company* (January 12, 1944), 39 MCC/..., and it was again held that the carrier is the proper party applicant and that its stockholder need not file an application. See Appendix J hereof.

For other examples of the long established consistent practice of the Commission of accepting purchase applications by corporate carriers without an application by their principal stockholders, see the decisions cited in the footnote.⁷²

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- ⁷² *Transportation Co.—Control—Arrow Carrier Corp.* (1940), 36 MCC 61; see also 38 MCC 137, 48 Fed. Supp. 933, ... U. S. ..., 88 L. Ed. 358;
Virginia—Carolina Coal Co.—Purchase—Evans, 1 MCC 309;
Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo, 5 MCC 479, 36 MCC 325;
Cincinnati, N. & Co. Ry. Co.—Control—Black Diamond Stages, 15 MCC 644;
Motor Express, Inc.—Purchase—Erie Freight Lines, Inc., 38 MCC 185;
Eastern Michigan Transportation Corp.—Control—Eastern Michigan Transportation, 25 MCC 483;
Trek, Inc.—Control—L. & L. Freight Lines, 25 MCC 675, 35 MCC 310;
Public Service Interstate Transportation Co.—Purchase—Healy, 5 MCC 735;
Valley Public Service Co.—Purchase—C. M. & S. Transit, Inc., 25 MCC 127;
System Service—Merger—Yakima Valley Motor Freight, 38 MCC 729;
Cincinnati & Lake Erie Transportation Co.—Purchase—King Bros., 15 MCC 447;
Motor Express & Terminal Corp.—Purchase—Arcade Freight Lines, Inc., 15 MCC 793;
Atlantic Greyhound Corporation—Purchase—Neel Gap Bus Lines, Inc. (1941), 37 MCC 784;
Days Transfer, Inc.—Purchase—Charles Delos Haner (1943), 39 MCC 339;
Pioneer Express Co.—Purchase—J. A. Henard, 15 MCC 659;
Ziffrin's Overnite Express, Inc.—Purchase—Overnite Express Inc., 5 MCC 246;
Penn. & Ohio Coach Lines Co.—Purchase—Cadiz Bus Line Co. (H. E. Dutt, Rec.), 5 MCC 382;
Motor Transport Co.—Purchase—Edward Jansen, 5 MCC 570;
Consolidated Bus Lines, Inc.—Purchase—Cherokee Motor Coach Co., Inc., 5 MCC 106;
Brooks Transportation Co., Inc.—Purchase—Jacobus Transfer Co., 5 MCC 85;
The Utah Idaho Central Railroad Corporation—Control—Messinger Truck Line, Inc., 39 MCC 25.

The matter was ably expressed in the dissenting opinion of Commissioner Porter, which was written when this case was decided by the full Interstate Commerce Commission on August 3, 1943, and in which he said (R. 33):

" * * * Thus for more than seven years we have decided hundreds of applications like the instant one without the majority stockholder of the purchaser being a party applicant; but suddenly the majority penalize this particular purchaser for following the procedure which we ourselves long since established. *Virginia-Carolina Coach Co.—Purchase—Evans*, 1 MCC 309, *Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo*, 5 MCC 479, 36 MCC 325. * * *

"In the second case above cited, on reconsideration, the Commission approved the application without requiring the signature on the application of that purchaser's sole stockholder, U. S. Truck Lines, Inc., or the latter's majority stockholders, Standard Carloading Corp., or that company's three stockholders * * *, or the stockholders of each of those three companies * * *. Yet, in approving the purchase there proposed, full cognizance was taken of all links in that chain. * * *"

Such a settled or uniform administrative construction of a statute is of a great weight in determining its meaning.⁷³

⁷³ *Boston & Main R. R. v. Hooker*, 233 U. S. 97; 34 S. Ct. 526; *Pocket Veto Case*, 279 U. S. 655, 688, 689; 49 S. Ct. 463; 73 L. Ed. 894; *Louisville & Nashville R. Co. v. U. S.*, 282 U. S. 740; 51 S. Ct. 297; 75 L. Ed. 672; *New York, N. H. & H. R. Co. v. I. C. C.* (1906), 200 U. S. 361, 401; 26 S. Ct. 272; 50 L. Ed. 515; *New York, N. H. & H. R. Co.* (1932), 287 U. S. 178, 190; 53 S. Ct. 106; 77 L. Ed. 248.

B. Appellants' contention would make uncertain title to all property heretofore purchased by a corporate carrier from another carrier.

In the case at bar there is particular reason for giving serious consideration to the significance of hundreds of decisions of the Commission under the Emergency Railroad Transportation Act of 1933 and Section 213 of the Motor Carrier Act of 1935.

Both the 1933 Emergency Railroad Transportation Act and the 1935 Motor Carrier Act prohibited⁷⁴ a person having control of one carrier from acquiring control of another carrier, except by a method authorized by the statute, *i. e.*, except by stock ownership. In other words, under the 1933 and 1935 statutes, there was only *one* lawful way that a carrier's stockholder could acquire control of another carrier,—that was by stock ownership.⁷⁵

According to appellants' contention, there are now as a result of the 1940 amendment at least *two* lawful ways that a carrier's stockholder may acquire control of another carrier; (1) by ownership of its stock, and (2) "or otherwise." Appellants' claim is that the transaction in the case at bar falls within the latter classification of acquisitions of control, which classification, they say, was first made lawful in 1940.

It will be seen at once, however, that the nature of the transaction has not changed; if the instant transaction amounts to an acquisition of control since 1940, the same transaction has *always* been an acquisition of control, and constituted an acquisition of control prior to 1940. That

⁷⁴Section 5(6) of the Emergency Railroad Transportation Act of 1933 and Section 213(b) (1) of the Motor Carrier Act of 1935.

⁷⁵Section 5(4) of the Emergency Railroad Transportation Act of 1933.

is to say, that if a purchase by a corporate carrier of another carrier's property has given the majority stockholder of that purchaser control of another carrier since 1940, it had exactly the same effect before 1940.

But prior to 1940 the corporate purchaser's stockholder could not be authorized to acquire such control, because prior to 1940 the words "or otherwise" were not in Section 5(2)(a)⁷⁰. It follows that under appellants' contention, a purchase of another carrier's property by a corporate carrier could not have been authorized prior to 1940 even under the property purchase clause. This is true because such purchase under appellants' contention, would have given the purchaser's stockholder a control over another carrier, which the Commission could not have authorized prior to 1940.

Thus, under appellants' contention, ever since 1933 it has been improper for the Commission to grant any corporate purchaser authority to purchase the property of another carrier. Prior to 1940 the grant of such authority was improper because thereby under appellants' contention the majority stockholder of the purchaser was granted authority to acquire control of another carrier, and prior to 1940 the Commission had no jurisdiction to grant such control. After 1940 the Commission did not have jurisdiction, under appellants' contention, to grant authority for such purchase because the corporate purchaser's stockholder was never required to be a party applicant to the

⁷⁰The Commission has held repeatedly that it cannot authorize such transactions as are not within the permissive provisions of former Section 213 or present Section 5(2)(a). See *Evansville & O. V. Ry. Co.—Purchase—Evansville & O. V. Ry. Co., Receiver*, 35 MCC 13; *Trek, Inc.—Control—L. & L. Freight Lines*, 25 MCC 675; *Trek, Inc.—Control—L. & L. Freight Lines*, 35 MCC 310; *Weimaster case*, 35 MCC 347; *Hankinson—Purchase—Commercial Freight Lines, Inc.*, 35 MCC 385; *Service Tank Lines and Steele—Control—Consolidated*, 35 MCC 193, 198.

purchase application prior to the decision of the Commission in the case at bar. Thus, it is seen, if appellants' contention were sound, it would render void all of the hundreds of purchases by corporate carriers of the property of another carrier which have been authorized and consummated since 1933. Plainly, to hold appellants' contention to be sound would raise havoc with the title to thousands of dollars worth of properties thus purchased.

Had appellants' contention been deemed correct by the Commission, it would have denied all applications by corporate carriers for authority to purchase the property of another carrier. But such applications were not denied. Accordingly it appears that the Commission did not deem appellants' contention to be sound, and in effect rejected appellants' construction of the Act. In other words, it did not interpret a corporate carrier's purchase of property from another carrier under the property purchase clause as giving the purchaser's majority stockholder control over the vendor carrier. The legislature is presumed to know the construction thus placed upon the property purchase clause.

C. Appellant's contention is not supported by normal rules of statutory construction.

Appellants say on page 18 of their brief that it is not their claim that the carrier control clause supersedes the property purchase clause. Whether or not appellants so assert, the inevitable result of their position is that the carrier control clause would in effect supersede and cut down the property purchase clause. Under their contention no corporate carrier could purchase property from another carrier unless the purchaser's stockholder would subject itself to the jurisdiction of the Commission by making an application under the carrier control clause.

Therefore the jurisdiction of the Commission under the property purchase clause is cut down to those cases where the corporate purchaser's stockholder is willing to submit to the jurisdiction of the Commission by making an application under the carrier control clause. This is a very definite limitation upon the jurisdiction of the Commission under the property purchase clause. If as in the case at bar the corporate purchaser's stockholder fails to submit to the jurisdiction of the Commission, the corporate carrier is effectively barred from purchasing the property of another carrier. Thus it is seen that under appellants' contention the carrier control clause would supersede the property purchase clause to the extent indicated, and the property purchase clause is thereby cut down.

The property purchase clause first appears in its present form in the Emergency Railroad Transportation Act of 1933. Substantially the same clause was made a part of Section 213 of the Motor Carrier Act of 1935. The same property purchase clause was re-enacted and kept as a part of Section 5(2)(a) by the Transportation Act of 1940. The legislature being presumed to know the prior construction of the property purchase clause, upon repeating in the amendments of 1935 and 1940 the words that had been thus previously construed, adopted the prior construction. Sutherland's "Statutory Construction" 3rd Edition, Volume 1, pages 428-429, and cases cited in Note 9 thereof.

The property purchase clause language remains the same. Congress could have, but did not, change the words of the property purchase clause. To hold that the property purchase clause had been changed by the addition in 1940 of the word "or otherwise" to the carrier control clause, would be to find an amendment by implication. Amendment or repeal by implication is not favored.

Sutherland "Statutory Construction" (1943) 3rd Edition, Volume 1, Section 1913, and cases there cited.

"Where an amendment leaves certain portions of the original act unchanged, such portions are continued in force, with the same meaning and effect they had before the amendment * * * (and) * * * where a statute purports to amend a designated clause of an existing statute, it will be presumed that such clause is the only one to which the legislature intended the amendment to apply." "

Furthermore, one of the simplest canons of statutory construction is that a qualifying clause is to be restrained to the last antecedent unless the subject matter requires a different construction (which can hardly be seriously urged here). *Puget Sound Electric Ry. et al. v. Benson* (1918), 253 Fed. 710, 711; 165 C. C. A. (9) 304; *Cushing v. Worrick* (1857), 9 Gray (Mass.) 382; *Ellis v. Murray* (1854), 28 Miss. 129; *Fowler v. Tuttle* (1851), 24 N. H. 9; *Gyger's Estate* (1870), 65 Pa. St. 311. The words "or otherwise" were added to the carrier control clauses only.⁷⁵ They were not added to the property purchase clause,⁷⁶ and cannot be taken to modify or affect that clause in any manner.

These rules of statutory construction confirm the fact shown by the history of the legislation that Congress never intended to give the Commission jurisdiction over a non-

⁷⁵ 59 C. J. 1097.

And see:

Huff v. Fetch, 143 N. E. 705, 194 Ind. 590;

Thompson v. Mossburg, 139 N. E. 307, 141 N. E. 241, 193 Ind. 566;

Whipple v. Christian, 80 N. Y. 523 (affirming 15 Hun. 321);

Bonnell v. Griswold, 80 N. Y. 128 (affirming 1 Hun. 332);

People v. Jefferson County Canvassers, 28 N. Y. S. 871, 77 Hun. 372;

Healy v. Wheeler, 72 A. 753, 75 N. H. 214.

⁷⁶Type B on page 6 hereof.

⁷⁷Clause 2, Type A, on page 6 hereof.

carrier who was not a connecting link between carriers. Congress did not intend and the statute does not require an application other than from the corporate carrier purchaser.

D. To refuse to accept Refiners Transport & Terminal Corporation as proper party applicant is to ignore that a corporation is a separate entity.

Union Tank Car Company is involved in the proposed transaction in only such manner as any stockholder is involved in the corporation's affairs. This being so, it accordingly follows that notwithstanding the argument on page 19 of their brief, appellants' contention in effect is to depart from the fundamental concepts of a corporation, and to disregard it as being an entity separate from its stockholders. This creates confusion and leads to results, the end of which cannot be foreseen as is hereinbefore pointed out. All of this is avoided by giving the usual and customary recognition to the corporate form when adopted by a carrier. The whole Interstate Commerce Act recognizes that a carrier may be, and in a majority of cases (especially as to railroads) is, a corporation.

Respect for the corporate entity is the ordinary, natural, reasonable legal approach to a situation involving corporations.⁸⁰ Even where substantive as well as jurisdictional issues are involved, it is generally held that neither ownership of a majority, or even all, of a corporation's stock, nor common officers, nor interlocking directorates, make a subsidiary the *alter ego*, or the agent of the sole or princi-

⁸⁰See the *Toledo Traction, etc. v. Smith* (1913), 205 Fed. 643.

pal stockholders," and in *Fletcher's Cyc., Corp.*, Permanent Ed., Vol. 9, page 300, Sections 4468-9, it is said:

"In nothing is the distinctness of the corporation from its members and officers more marked and emphasized than in the determination of parties. They are not parties by reason of its being one. * * * If the cause of action belongs to the corporation, it should sue; and neither officer, stockholder or creditor as such * * * can bring suit * * *"

"The corporation is the sole plaintiff on all contracts running to it as the sole promisee * * *"

This general rule that a corporation alone is a proper party applicant has been expressly declared and followed,

⁸¹ *Fullman Palace Car Co. v. Mo. Pac. Ry. Co.* (1885), 115 U. S. 587; 29 L. Ed. 499;

Hazelton Corporation v. General Electric Corp. (1937), 19 Fed. Supp. 898;

Cleveland Trust Co. v. Consolidated Gas, etc. (C. C. A. 4th 1932), 55 Fed. (2d) 211;

Mas v. Nu-Grape Co. of America (C. C. A. 4th 1932), 62 Fed. (2d) 113;

Burnett Commissioner v. Riggs National Bank (C. C. A. 4th 1932), 57 Fed. (2d) 980;

Duffy v. Freide (C. C. A. 4th 1935), 75 Fed. (2d) 17;

Majestic Co. v. Orpheum Circuit (C. C. A. 8th 1927), 21 Fed. (2d) 720;

American Cyanamid Co. v. Wilson (C. C. A. 5th 1931), 51 Fed. (2d) 665;

Cannon Mfg. Co. v. Cudahy Packing Co. (1924), 267 U. S. 333, 69 L. Ed. 634;

U. S. v. Elgin R. R. (1935), 298 U. S. 492, 80 L. Ed. 1300;

Burnett Commissioner v. Commonwealth Improvement Co. (1932), 287 U. S. 415, 77 L. Ed. 399;

Sloan Shipyards Corp. v. U. S. Shipping Board (1922), 258 U. S. 549, 66 L. Ed. 762;

McLean v. Goodyear Tire & Rubber Co., Inc. (1936), 85 Fed. (2d) 150;

Leaman Transportation Company, Inc., Contract Carrier Application, 34 MCC 73;

Lee Wilson & Co. Contract Carrier Application, 29 MCC 525.

not only in proceedings before the Interstate Commerce Commission,⁵² but also before other commissions.⁵³

There is nothing in the Interstate Commerce Act which would indicate that Congress intended to depart from this traditional view of the corporation and have its stockholder as well as the corporation make an application. On the contrary, the Act indicates that Congress was well aware of corporate structures and of stockholders' importance. Congress appropriately provided in Section 204(a)(7) and Section 220(d) of Part II of the Interstate Commerce Act that the Commission does have certain powers with reference to stockholders controlling carriers. For example, the Commission is given express authority to inquire into the management of the business of persons controlling a motor carrier and to examine such persons' books.⁵⁴

Such provisions, so far as they relate to stockholders controlling purchasing motor carriers, would have been unnecessary if the control clause of Section 5(2)(a) were to be interpreted as protestants now urge. These provisions do make it clear, however, that in any proposed transaction such as the purchase of one carrier by another carrier, the Commission has full authority to investigate and determine all pertinent facts relating to any stockholder controlling the applicant.

⁵² *Weismaster case*, 35 MCC 47;

Burlington Transportation Co.—Purchase—Hartelt Truck Lines, Inc. (1942), 38 MCC 497.

⁵³ A corporation and not its principal stockholder was recognized as being the proper party applicant before other Commissions in *Georgia S. & F. Ry. Co., et al., v. Georgia Public Service Commission* (1923), 289 Fed. 878; *Toledo Traction etc. Co. v. Smith*, 205 Fed. 643, 672; *Illinois Bell Telephone Company v. Moynihan*, 38 Fed. (2d) 77, 80, reversed on other grounds in *Smith v. Illinois Bell Telephone Company*, 282 U. S. 133, 75 L. Ed. 255, but see discussion of Headnote 2.

⁵⁴ Sections 204(a)(7) and 220(d) which are quoted in Appendix K hereof.

IV.

**THE DISTORTED CONSTRUCTION OF SECTION 5(2)(a) URGED
BY APPELLANTS WOULD ACCOMPLISH NO MERITORIOUS
PURPOSE AND WOULD DO IRREPARABLE HARM**

The motive for straining to place the transaction in the carrier control clause, when obviously it falls directly within the property purchase clause, is thereby to enlarge the Commission's jurisdiction. Not only is this over-reaching, illegal and unauthorized, but it accomplishes no meritorious purpose.

The jurisdiction which the Commission is reaching for is that conferred by section 5(3). Out of the provisions there enumerated, appellants concede on pages 22 and 45 of their brief that only Sections 214 and 204(a) could possibly be of any interest in the case at bar.

Analyzing the provisions of these sections it appears that the additional power thereby conferred would have no usefulness whatsoever in the situation here presented.

Section 214 gives the Commission jurisdiction over the issuance of securities. The Commission already has jurisdiction over the stock and other securities of the carrier here involved, that is, Refiners Transport & Terminal Corporation, and therefore has complete and extensive authority to control the securities and the finances of the carrier business. The Commission has no legitimate interest in any other securities.⁵⁵

⁵⁵As a matter of fact, it is common knowledge that the stock of Union Tank Car Company (the majority stockholder of Refiners Transport & Terminal Corporation) is listed on the New York Stock Exchange and is subject to the jurisdiction of the Securities and Exchange Commission. If the Interstate Commerce Commission by nebulous reasoning were seeking to get control of the securities of Union Tank Car Company, it would be attempting to encroach on the authorities now being exercised by the Securities and Exchange Commission.

Section 204(a), the other of the provisions last above mentioned, makes it the duty of the Commission to regulate common carriers by motor vehicle and authorize the establishment of:

"Reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

It is inconceivable how any such requirements as the Commission could make under this section as to the conduct of the motor carrier business could be better enforced if Union as the carrier's majority stockholder was made subject to the Commission's jurisdiction. Of the matters enumerated in this section the only ones of any possible pertinency here are accounts, records and reports. But obviously no good purpose would be served by any attempt to make the books of account of a tank car business conform to a uniform system of accounts, records and reports, and preservation of records, designed and suitable for only a motor carrier business. That it would be impracticable to try to force any business other than that of a motor carrier to conform to an accounting system designed for a motor carrier is self-evident, and is recognized by the Commission itself in its recent decision rendered in *The Utah Idaho Central Railroad Corporation—Control—Messinger Truck Line, Inc.*, 39 M.C.C. 25.

Furthermore, even though the majority stockholder files no application, its books and records are subject to examination by the Commission by virtue of the terms of Sections 204(a)(7) and 220(d).²² Also, even aside from any

²²See Appendix K hereof.

statute the Commission could under suitable circumstances subpoena the records of the carrier's majority stockholder as was done in *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 35 S. Ct. 645, 59 L. Ed. 1036.

Therefore, it is apparent that no good is gained by the specious reasoning necessary to place the transaction in the carrier control clause.

Such an interpretation as is urged by appellants would, in fact, grievously affect the transportation business. In the first place, a carrier, either rail, motor or water, could not purchase the operating rights or other property of another carrier unless the person or persons who owned a controlling interest of its capital stock were willing to subject himself or themselves to the jurisdiction of the Interstate Commerce Commission by becoming party to an application for authority to consummate the purchase. The inconvenience and impracticability of such a situation is realistic in the case of a large railroad having hundreds of stockholders. That it is an absurd result is apparent in the case of a small corporate motor carrier whose stock is owned perhaps by a man and by his wife. Perhaps her sole assets are her household goods. It is absurd to require a financial statement and an income statement from such a housewife, such as are required by the Commission from every applicant in a finance proceeding. Such inconvenient and unnecessary requirements would greatly hinder the normal growth of the transportation industry.

But even more serious than the inconvenient and unreasonable results which follow from appellants' contention, is the discouragement resulting therefrom to investors who might otherwise put capital to work in the transportation industry. A stockholder might be faced with the choice of submitting himself to the Interstate Commerce Commission's jurisdiction or preventing the corporate carrier in

which he owned stock from purchasing operating rights or other property from another carrier. Rather than place himself in such a situation an investor would refuse to put his capital in the transportation industry. The motor carrier business is comparatively new and is in need of capital. Its future development and growth would be very seriously impaired if appellants' contention were to be adopted.

The importance of this is even greater when it is realized that it would require any stockholder, even an insurance company or a trust company or a bank, who owns stock in a carrier to come before the Commission if that carrier wished to purchase property of another carrier. In *Triangle Securities Trust, etc.—Control—Georgia Stages, Inc. Purchase—St. Andrews Bay Transport Co.*, No. MCF-2119, 4 Fed. Carriers Case, ¶30,703, decided December 21, 1943, Division 4 of the Commission refused to accept the purchase application until the corporate purchaser's stockholder, a finance company, submitted to the jurisdiction of the Commission, under the rule announced by the Commission in this case.

CONCLUSION

Thus it is seen that appellants' contention would be of no benefit as a regulatory means and would do immeasurable harm in the transportation industry. In the case at bar, the transaction proposed is a purchase by one carrier of the property of another carrier. The proposal falls directly within the property purchase clause. The plain words of the property purchase clause should not be ignored but should be recognized, and the application accepted and acted upon as filed by the carrier, Refiners Transport & Terminal Corporation. There was no occasion whatsoever to dismiss the application for lack of a proper party applicant. The judgment of the District Court should therefore be affirmed.

Respectfully submitted,

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Dated: March 17, 1944.

APPENDIX A
---**HISTORY OF THE ORGANIZATION OF REFINERS
TRANSPORT & TERMINAL CORPORATION**

The history of Refiners and its personnel is set forth in 36 M.C.C. 789, and in the transcript of testimony taken by the Examiner of the Interstate Commerce Commission (107, 108, 119, 122, 123, 154-158) as follows:

Refiners Transport & Terminal Corporation is a Delaware corporation organized September 24, 1940 for the purpose among others, of effecting reorganization of the motor transportation business conducted by the Overland Transportation Corporation, a corporation engaged in interstate commerce in Michigan since 1930; Petroleum Transit Corporation which has engaged in intrastate commerce in Ohio and Illinois since October 1936 and in interstate commerce since February 1938; and Petroleum Haulers, Inc., a corporation engaged in intrastate commerce in Ohio and Indiana since October 1937. Refiners was brought about by the stockholders of the three corporations named which had common stockholders and management (107, 108). On November 1, 1940 Refiners acquired all of the outstanding capital stock of the predecessor corporations through exchange of 31,897½ shares of its own capital stock. Refiners also caused a new corporation United Transport Corporation to be incorporated October 29, 1940 and bought ten shares of its capital stock having a par value of \$100.00 for \$1,000.00 cash. That corporation has never actively engaged in business.

On November 7, 1940 Union Tank Car Company acquired from Refiners' stockholders 12,900 of the 31,897½

shares of the stock previously issued in exchange for stock of the subsidiaries and acquired from Refiners 4,800 additional shares for \$56,000 cash (122, 123). On January 15, 1941 Union Tank Car Company acquired additional shares of Refiners for \$133,025, thereby acquiring direct control of Refiners (122). Refiners began transportation operations in intrastate commerce on March 1, 1941, when it took over the business of Overland.

Pursuant to orders entered February 24, 1941 in Nos. MC-FC-14544 and MC-FC-14544A, Refiners took over Petroleum Transit's certificate of public convenience and necessity authorizing Refiners to engage in interstate commerce as a motor vehicle common carrier (119). Refiners has been engaged in interstate commerce since April 25, 1941. Overland Transportation Corporation and Petroleum Transit Corporation have been dissolved (119). Petroleum Haulers, Inc., is a wholly owned subsidiary operating intrastate in the State of Indiana (119).

Pursuant to order entered June 30, 1941 in MC-F-1536, reported in 36 MCC 789, Refiners issued 50,000 additional shares of its capital stock to Union Tank Car Company thereby increasing its holdings to 82.6% of Refiners' outstanding stock (124). After the acquisition of stock by Union Tank Car Company the management of the transportation companies was left to the same people who had managed the business of the predecessor companies, namely, Messrs. Turner, Yokom and Lathrop (112).

The officers of Refiners Transport & Terminal Corporation are E. S. Turner, President, Charles J. Yokom, Vice President, Charles F. Lathrop, Secretary and Assistant Treasurer, and Fred L. Crawford, Treasurer (110).

The directors of Refiners are E. S. Turner, C. F. Lathrop, F. L. Crawford, B. C. Graves, and C. J. Yokom (111).

Messrs. Turner, Yokom, Lathrop and Crawford, who are officers and constitute four of the five directors of Refiners, were all officers and directors of all the predecessor corporations. The predecessor corporations had common stockholders, officers and directors (107, 110, 117, 118, 122, 154-158, see also MC-F-1536, 36 MCC 789).

Mr. Turner has been in the transportation business for about 30 years, 10 of which were in the transportation of petroleum products (108-109). He retains about 20% of the stock of Turner Cartage and Storage Company, a company engaged in the business of carting and erecting heavy machinery in and about Detroit. He does not have any part of the active management of that corporation, and it is not in any way connected with Refiners Transport & Terminal Corporation and does not operate in interstate commerce (109).

Mr. Crawford does not take any active part in the management of the corporation. He is not interested in any other transportation company. Mr. B. C. Graves is Vice President and director of the Union Tank Car Company. Although Refiners has directors' meetings scheduled for once a month, they are not held regularly (111). Neither Mr. Graves nor Mr. Crawford takes an active part in the management of Refiners Transport & Terminal Corporation, and its business is conducted in substantially the same manner as it was before the organization of Refiners Transport & Terminal Corporation (112).

Refiners does not have directors or officers common with Union Tank Car Company except for Mr. Graves, who is director of Refiners and also officer and director of Union Tank Car Company. No corporation other than Union Tank Car Company has any stock ownership in Refiners. Refiners does not have common directors or officers with any carrier corporations other than Petroleum Haulers,

Inc., and United Transport Corporation. E. S. Turner and H. J. Turner hold as voting trustees 6.3% of the stock of Refiners. The stock held as voting trustees is held for the benefit of Cora Turner, H. J. Turner and Grace Priebe.

APPENDIX B

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1930

Recommendation

"8. That consideration be given by the Congress, in the light of such facts as may be disclosed by the investigation of the Committee on Interstate and Foreign Commerce (H. R. 114) which is now in progress, to possible legislation providing for public regulation in certain respects of so-called holding companies which may or do control carriers by railroad subject to our jurisdiction" (p. 97).

APPENDIX C

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1931

Recommendation

"9. That section 5 (2) of the Interstate Commerce Act be amended so as to bring the jurisdiction of the commission for approval or disapproval any acquisition of the

control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding companies or otherwise; and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the Commission. . . . " (p. 121).

APPENDIX D

QUOTATION FROM ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION FOR 1932

"Group I

Recommendations for Legislation

"7. That section 5(2) of the Interstate Commerce Act be amended so as to

(a) Authorize, under Commission supervision, *every legitimate and desirable method of combining* railway properties, including consolidations, mergers, purchases, leases, operating contracts, and acquisitions of stock control of carriers by other carriers, and also by a single holding company.

(b) Prohibit every other means of bringing railroad companies under common control or management in a common interest, however such result is attained.

(c) Provide that if *union through* a single holding company is authorized, the Commission shall have juris-

diction over the capitalization of that company and power in its discretion, to regulate its accounting, inspect its books and records, and require reports.

(d) " * * * " (p. 101). (Emphasis added.)

APPENDIX E

H. R. 9059, 71st Congress, 1st Session (1932):

"A BILL To amend section 5 of the Interstate Commerce Act, as amended, relating to the consolidation and acquisition of control of carriers by railroad, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the interstate commerce act, as amended (U.S.C. title 49, sec. 5), is amended by striking out paragraphs (2) and (3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively.

— Sec. 2. Such section is further amended by striking out paragraphs (6), (7), and (8) and by inserting lieu thereof the following paragraphs:

"(4) It shall be lawful, under the conditions specified below, but under no other conditions, for two or more carriers, to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier; or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through

ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock:

“(A) The proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control shall be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and shall be approved by the commission.

“(B) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this paragraph, the carrier or carriers or corporation seeking authority therefor shall present an application to the commission, and thereupon the commission shall notify the governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing.

If after such hearing the commission finds that the public interest will be promoted by the transaction proposed and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe.

“(C) Whenever a corporation which is not a carrier is authorized, by an order entered under subparagraph (B) of this paragraph, to acquire control of any carrier or two or more carriers, such corporation thereafter shall, to the extent provided by the commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations

of such paragraphs, be considered as a common carrier subject to the provisions of this act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), " . . . be considered as a 'carrier'"

APPENDIX F

Motor Carrier Act of 1935, Section 213(b)(1):

"It shall be lawful, under the conditions specified below, but under no other conditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and/or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof."

APPENDIX G

Senator Wheeler's explanation of the importance of the amendments to Section 5 by the Transportation Act of 1940. - Congressional Record, Vol. 86, p. 11678, 76th Congress, 3rd Session (1940):

"Pooling and Consolidations

"The provisions of the conference substitute governing pooling and consolidations, mergers, etc., of all carriers are in Section 7, amending Section 5 of the Interstate Commerce Act. These provisions follow generally the provisions of Section 10 of the Senate Bill as to pooling, and of section 49 of the Senate bill as to unifications of carriers. The pooling provisions in amended Section 5, paragraph 1, cover all carriers subject to the act. The conference substitute here differs from the Senate bill, in which the pooling provisions related only to carriers by railroad or water.

"The principal change in existing law on consolidations is the repeal of provisions requiring the Commission to prepare and adopt a general consolidation plan. Section 213 of the Motor Carrier Act, which related to unifications of motor carriers, is repealed and the law governing all consolidations of carriers subject to the act is covered by the amended Section 5 of the Interstate Commerce Act.

"Present law is also amended by inclusion of the Harrington amendment, protecting employees in the event of consolidations and by directing the Commission to give weight to the following questions when passing upon any proposed transaction; first, the effect upon adequate transportation service to the public; second, effect upon the public interest of the inclusion, or failure to include, other

railroads in the territory involved; third, the total fixed charges; and fourth, the interest of the carrier employees affected. The Commission is also instructed not to approve any consolidation, merger, etc., which contemplates a guaranty of dividends, except upon a specific finding that such guaranty is not inconsistent with the public interest."

APPENDIX H

Section 5a(2)(a) of Senator Wheeler's Proposed Carrier Holding Company Bill S. 2016, 76th Congress, First Session 1939, which failed of enactment, provided:

"(2) (a) As used in this part, the term 'carrier holding company' means a company (other than a company the principal business of which is that of a carrier) which—

"(A) holds with power to vote, owns, or controls 10 per centum or more of the outstanding voting securities of a carrier or of a company which is a carrier holding company by virtue of this subparagraph (a), unless the Commission, as provided in subparagraph (b), by order determines such company not to be a carrier holding company; or

"(B) controls, directly or indirectly, alone or pursuant to an arrangement or understanding with one or more other persons, by stock ownership, lease agreement, or voting trust, by common officers, directors, or stockholders, by reason of circumstances or methods surrounding organization or operation, or by any means whatsoever, a carrier or a company which is a carrier holding company by virtue of this subparagraph (a)."

APPENDIX I

Section 79a of the Public Utility Holding Company Act of 1935 (U. S. Code, Title 15) is entitled "Necessity for control of holding companies." Following thereunder, subsections (a) (b) enumerate the possible evils of public-utility holding companies, and subsection (c) declares:

"(c) When the abuses of the character above enumerated become persistent and wide-spread, the holding company becomes an agency which, unless regulated, is injurious * * *; and it is hereby declared to be the policy of this chapter * * * to eliminate the evils as enumerated * * *; and for the purpose of effectuating such policy to compel the simplification of public-utility holding company systems * * *, and to provide * * * for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter."

Section 79b (a)(7) then defines "holding company" as used in the Act to mean:

"(A) Any company which directly or indirectly owns, controls or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company * * *, unless the Commission as hereinafter provided, by order declares such company not to be a holding company; and

"(B) Any person which the Commission determines * * * to exercise * * * such a controlling influence over the management and policies of any public-utility * * * as to make it necessary or appropriate in the public interest * * * that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon holding companies * * *."

Thus Congress in the Holding Company Act laid down a clearly defined policy, and, as the Supreme Court said, the Act speaks for itself. *Electric Bond & Share Co. v. Securities and Exchange Commission* (1938), 303 U. S. 419, 438; 58 S. Ct. 678; 82 L. Ed. 936.

APPENDIX J

INTERSTATE COMMERCE COMMISSION

No. MC-F-2332

Burlington Transportation Company—Purchase—Chicago,
Burlington & Quincy Railroad Company

Submitted December 4, 1943

Decided January 12, 1944

Division 4, Commissioners Porter, Mahaffie and Miller

By Division 4:

“Burlington Transportation Company and the Chicago, Burlington & Quincy Railroad Company, both of Chicago, Ill., herein called vendee and the railroad, respectively, by joint application filed October 12, 1943, seek authority under section 5, Interstate Commerce Act, for the former to purchase certain motorbus operating rights and property of the latter for \$300. The application is unopposed.

“Vendee has been under control of the railroad since its formation in 1929. * * *

"We find that purchase by Burlington Transportation Company of the above-described operating rights and property of the Chicago, Burlington & Quincy Railroad Company, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of section 5(2)(a), and will be consistent with the public interest.
• • •"

MAHAFFIE, *Commissioner*, concurring:

"Our approval of the instant application is construed in the dissent as a departure from the decision in *Refiners Transport & Term, Corp.—Purchase—Marshall*, 39 M.C.C. 271, because we do not require the Great Northern Railway Company and the Northern Pacific Railway Company, which companies together control the Chicago, Burlington & Quincy Railroad Company, to join in this application. The decision in the *Refiners case*, however, was based on that portion of section 5(2)(a) relating to acquisition of control by 'a person which is not a carrier.' The majority opinion of the court which set aside our decision in that case defined the issue as follows:

"The essential controversy is whether the statute is satisfied by securing the approval and authority of the Commission to consummate the sale upon the joint application of Transport and Refiners, or whether Union, as the owner of the majority of Refiners' stock, must also be joined in the application. The significance of the decision resides in the requirements of s.5(3) of the Act which subjects to the jurisdiction of the Commission any person, other than a carrier, who acquires control of a carrier with the approval of the Commission. • • •"

"In the instant case, no such question is involved; both the Great Northern and the Northern Pacific are 'carriers' as defined by the act."

PORTER, *Commissioner*, dissenting:

"In the case of *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M.C.C. 271, as I understand it, the entire Commission held that the application by Refiners to purchase Marshall Transport must be dismissed because the Union Tank Car Company, which owned 82.6 percent of Refiners capital stock and therefore controlled it, was a necessary party, and had not joined in the application.

"I dissented at some length in that proceeding for reasons which need not be repeated here, but suffice it for me to say, that I regarded it as wholly unnecessary, absolutely impossible of practical application, and certain to lead to absurd results, and not good law.

"Despite the fact that a District Court of the United States for the District of Maryland, composed of three judges, reversed the action of the Commission and held that Union was not a necessary party, we have continued, as a division, to follow the action of the Commission, pending an appeal to the Supreme Court.

"In the *Refiners case* the Commission in holding that Union should be made a party, did not go beyond the control of Union, but if that decision means anything, surely it is that having started to ascend the genealogical tree, we should climb until the branches are so dispersed that no one, or more acting together, has control.

"In this case, the Burlington Transportation Company is purchasing from its controller, Chicago, Burlington & Quincy Railroad Company, so that the Transportation Company's immediate controller is a party. We know, however, that the Chicago, Burlington & Quincy Railroad Company is in fact controlled by the Great Northern Railway Company and the Northern Pacific Railway Company.

If we are to be consistent and follow the Refiners decision, they are necessary parties to this proceeding and are not here. The case should be dismissed.

"True, this result is worse than silly, but it is the natural result of a bad decision."

APPENDIX K

PROVISIONS OF THE INTERSTATE COMMERCE ACT WHICH DEFINE AND LIMIT THE JURISDICTION OF THE COMMISSION OVER THE STOCK- HOLDER OF A CARRIER

Section 204 (a) (7) of Part II of the Interstate Commerce Act:

"It shall be the duty of the Commission—

(7) For the purposes of the administration of the provisions of this part, to inquire into the management of the business . . . of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendation (including recommendation as to additional legislation) as the Commission may deem necessary."

● S. Code Title 49, Sec. 304(a)(7).

Congress also provided in Section 220 (d) of Part II of the Interstate Commerce Act 320 (d) in the U. S. Code:

“ * * * The Commission or its duly authorized special agents, accountants or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings or equipment of motor carriers, brokers and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence and other documents of any person controlling, controlled by or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transaction with such carrier.”

U. S. Code Title 49, Sec. 320(d).

SUPREME COURT OF THE UNITED STATES.

No. 589.—OCTOBER TERM, 1943.

The United States of America, Interstate Commerce Commission, Coastal Tank Lines Inc., et al., Appellants,
vs.

Marshall Transport Company, Warren C. Marshall, Refiners Transport Terminal Corporation.

Appeal from the District Court of United States for the District of Maryland.

[April 24, 1944.]

Mr. Chief Justice STONE delivered the opinion of the Court.

On an application to the Interstate Commerce Commission of two carriers by motor vehicle, appellee Refiners Transport Terminal Corporation and appellee Marshall Transport Company, for permission for Refiners to purchase the property and operating rights of Marshall, the Commission found that Refiners, the vendee-carrier, was controlled through stock ownership by a non-carrier, Union Tank Car Company, and that the proposed purchase would result in the acquisition by Union of control of the property and business of Marshall. Construing §§ 5(2)(a) and (b) of Part I of the Interstate Commerce Act, 24 Stat. 379, as amended by the Transportation Act of 1940, 54 Stat. 905, 49 U. S. C. §§ 5(2)(a) and (b), as requiring the application to be made by Union, the non-carrier corporation controlling Refiners, the Commission denied the application of the carriers for lack of power in the Commission to approve the purchase.

The questions for our decision are (1) whether the acquisition of the property and franchises of one carrier by another, which is controlled by a non-carrier, involves the acquisition of control of the first or vendor-carrier by the non-carrier for which the Commission's approval is required by § 5(2)(a) of the Interstate Commerce Act; and if so (2) whether the Commission rightly held that under § 5(2)(b) of the Act it could not consider the propriety of the transaction in the absence of an application by the non-carrier for the Commission's authority to acquire control.

Appellee Refiners holds certificates of public convenience and necessity from the Interstate Commerce Commission to operate as a common carrier, by motor vehicle, of gasoline and petroleum products in Pennsylvania and eight of the central states. Re-

2 *The United States et al. vs. Marshall Transport Co. et al.*

finers, as the Commission found, is controlled through ownership of 82.6% of its outstanding common stock by Union Tank Car Company, a non-carrier corporation. Marshall, a corporation, holds a certificate of public convenience and necessity under the grandfather clause, §206 of the Interstate Commerce Act, 49 U. S. C. §306, authorizing carriage, as a common carrier, of petroleum products, in bulk in tank trucks, over irregular routes in Maryland, Delaware, Pennsylvania, Virginia, and Washington, D. C. By their joint application Refiners and Marshall sought authority of the Commission under §5(2)(a) for Refiners to acquire by purchase the operating property and rights of Marshall.

After a hearing on the application, in which nine motor carriers, co-appellants here, appeared as protestants, and the Anti-trust Division of the Department of Justice intervened, Division 4 of the Commission issued its report finding that the proposed purchase was within the scope of §5(2)(a) and (b) and would be consistent with the public interest. It overruled contentions of the protestants that the proposed purchase would result in the acquisition of control of Marshall by Union, the non-carrier, through its control of Refiners, the purchaser, so as to require that Union join in the application. 39 M. C. C. 93. On petition for rehearing the Commission reversed the holding of Division 4. It concluded that as Union, the non-carrier, already controlled one carrier, Refiners, the purchase of the property and business of Marshall by Refiners would result in their control by Union, and that under §§5(2)(a) and (b) and related sections this could not be done without an application by Union for the Commission's authority to do so. 39 M. C. C. 271.

Union having failed to apply for that authority within the twenty days allowed for that purpose by the Commission's order, the Commission dismissed the pending application of Refiners and Marshall. Upon the suit of appellees the District Court for Maryland, three judges sitting, set aside the Commission's order, Circuit Judge Soper dissenting, 52 F. Supp. 1010, and the case comes here on appeal under 28 U. S. C. §§47(a), 345.

Section 5(2)(a) of the Act, makes it "lawful, with the approval and authorization of the Commission . . . for two or more carriers to consolidate or merge their properties or franchises . . . into one corporation for the ownership, management, and operation of the properties theretofore in separate management; or for any carrier . . . to purchase . . . the properties . . . of another;

ownership

... or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise".

Section 5(2)(b) provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority thereunder shall present an application to the Commission. . . ." And § 5(3) provides that "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to" specified provisions of the Act, relating mainly to the keeping of accounts, the making of reports, access to records, the issuance of securities and the assumption of liabilities.

Section 5(4) makes it "unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of . . . a holding or investment company or companies, a voting trust or trust, or in any other manner whatsoever.

As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

In determining whether, under the non-carrier control clause of § 5(2)(a), Union, the non-carrier here, is required to file an application with the Commission, the issue turns on the questions whether, within the meaning of the statute, Union is by the proposed transaction attempting to "acquire control" of Marshall and, if so, whether Union is within the requirement of § 5(2)(b) that the person seeking the authority of the Commission to acquire such control shall present his application to the Commission. In answering these questions the District Court thought that the several instances specified by § 5(2)(a), in which the Commission is authorized to permit acquisition of carrier control, are separate and independent of each other so that, the Commission having full authority to authorize Refiners to purchase Marshall under the merger and purchase provisions of § 5(2)(a), its authority in that respect is not limited or superseded by the non-carrier control provision appearing later in the subparagraph and that provision is therefore inapplicable.

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In any case the District Court concluded that these provisions are permissive only, giving the Commission authority to act with respect to any one without regard to the restriction imposed by any other. Since Refiners' and Marshall's application to the Commission for approval of Refiners' purchase of Marshall's property and operating rights are within the permissive authority of the Commission under the purchase provision of § 5(2)(a), the Court thought that it was not necessary for Union to comply with the non-carrier provision and with the requirement of § 5(2)(b) by joining in the application even though the non-carrier provision would otherwise be applicable to the transaction.

But this overlooks the fact, which the Commission thought controlling, that the present transaction may fall within both the purchase provision and the non-carrier control provision of the statute since it involves not only the purchase of Marshall by Refiners but also the acquisition of control of Marshall by Union, through its control of Refiners. The question then is not whether the non-carrier control provision limits or supersedes the purchase provision but whether, as the Commission thought, both apply, and if so the extent to which they restrict the Commission's authority to approve the acquisition of control by a non-carrier which has not filed an application pursuant to § 5(2)(b).

As a matter of statutory construction it does not follow that such parts of the proposed transaction in this case as are subject to the requirement of the non-carrier control provision can escape that requirement because the transaction also involves a purchase which falls within and satisfies the requirement of the purchase provision of the statute. Section 5(4) prohibits each of the transactions enumerated in § 5(2)(a) unless approved by the Commission. And it is plain that if the proposed transaction involves Union's non-carrier control of Marshall within the meaning of § 5(2)(a), appropriate application to the Commission for its approval must be made in conformity to § 5(2)(b). Hence our inquiry must be directed to the nature of the requirement of the non-carrier control provision of the statute and to the question whether if applicable it is satisfied by appellees' application to the Commission in which the Union did not join.

It is not doubted that if Union, having control of Refiners, sought to acquire stock control of Marshall, Union would be required by § 5(2)(b) to apply for the Commission's authority to do so. But it is said that having control of Refiners, Union may, by procuring Refiners' compliance with the purchase provisions

of the statute alone, extend its control indefinitely to other carriers merely by directing the purchase of their property and business ~~Refiners~~, without subjecting itself to the jurisdiction of the Commission as provided in § 5(3), so long as Union does not act directly as the purchaser of the property¹ or of a controlling stock interest in such other carriers.

We think that neither the language nor the legislative history of the statute admits of so narrow a construction. Section § 5(4) makes it unlawful, without the approval of the Commission as provided by § 5(2)(a), for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Not only is this language broad enough in terms to embrace the acquisition of control by a non-carrier through the purchase, by a controlled carrier, of the property and business of another carrier, but the legislative history indicates that such was its purpose.

Congress, by § 407. of the Transportation Act of 1920, 41 Stat. 480, amended the Interstate Commerce Act so as to provide in § 5(2) that the Commission should have authority to permit a rail carrier or carriers to acquire control of another by lease or purchase of stock; by § 5(8) the carriers affected were relieved from the operation of the antitrust laws, and by § 5(6) the Commission was authorized upon special conditions to approve the actual consolidation of rail carriers. By the 1933 amendment of § 5(2), 48 Stat. 217, the Commission was given further authority to permit unified control of two separate carriers "through ownership of their stock" and in 1940, § 5(2)(a) was amended to read as at present by the addition of the words "or otherwise" to the phrase last quoted, and the section was made applicable to motor carriers, 54 Stat. 905. Section 1(3)(b) of the Act as amended in 1940 declares that "control" "shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control".

The Conference Committee Report on the Transportation Act

¹Such an acquisition of operating property, whether or not within § 5(2)(a), would render the acquiring corporation an operating carrier within §§ 203(a)(14)-(16) subject as such to the jurisdiction of the Commission under Part II. Similarly the transfer of the carrier's operating franchises would be subject to the Commission's jurisdiction under § 212(b).

6 *The United States et al. vs. Marshall Transport Co. et al.*

of 1940, H. R. Rep. No. 2832, 76th Cong., 3rd Sess., p. 63, points out that this definition of "control" was added in order to make applicable to specified sections of the Act, including § 5, the benefit of the interpretation of this Court in *Rochester Telephone Co. v. United States*, 307 U. S. 125, 145-6, of the similar definition of "control" in § 2 of the Communications Act of 1934, 48 Stat. 1065, 47 U. S. C. § 152(b). In that case this Court had emphasized the breadth of the statutory language as embracing every type of control in fact. It had declared that the existence of control must be determined by a regard for the "actualities" of intercorporate relationships and that the Commission's determinations of fact, if warranted by the record, were conclusive.

Here the statute has declared that the non-carrier control to be approved by the Commission is control through stock ownership "or otherwise". § 5(2)(a). It has in the broadest terms prohibited the effectuating of "control or management . . . however such result is attained, whether directly or indirectly by common directors, officers or stockholders, a holding or investment company . . . or in any other manner whatsoever," § 5(4). "Control or management" is defined to include "the power to exercise control or management". § 5(4). The control or management whose acquisition is prohibited unless the approval of the Commission is secured is that which is obtained "in any . . . manner whatsoever" "however such result is attained, whether directly or indirectly", § 5(4). It includes "actual as well as legal control", § 1(3)(b), and "the power to exercise control or management," § 5(4).

Appellees argue that the Commission, in finding that the proposed purchase of the property and franchises of Marshall would be an acquisition of "control" requiring the Commission's approval under §§ 5(2)(a) and 5(4), disregarded the words of the statute which speaks only of acquisition of control of another "carrier", defined in § 1(3)(a) as a "person" natural or artificial, and not of acquisition of control of its property. But such a literal interpretation of the statute ignores its essential object. What § 5(4) read with § 5(2)(a) prohibits, unless authorized by the Commission, is the merger by two or more carriers of "their property" or franchises . . . into one corporation for the ownership, management ~~and~~ operation of the properties theretofore in separate ownership", and the acquisition by a non-carrier, having control of one carrier, of control of another, or the effectuating in any other manner of "the control or management in a common interest of any two or more carriers".

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The statute is thus concerned, not merely with the acquisition of control of one corporation by another, but with the acquisition of control of a corporation which is doing the business of a carrier, because such control is in effect control of its carrier business. Control of that business, which may be effected by stock ownership, may also be "otherwise" effected through a contract of a controlled carrier to purchase the business of the other carrier, if the purchase receives the approval of the Commission. The power thus acquired over the vendor-carrier by the contract of purchase is the power "to exercise control or management" over its carrier business which, under § 5(4), can become effective only with the approval of the Commission. As the Commission pointed out in its report, there can be no more direct or positive manner of obtaining control than by outright purchase of another carrier's business and property and the purpose of the Act would be defeated if outright purchase, through the medium of a controlled subsidiary carrier, of another carrier's property and operating rights, were exempted, while control by purchase of stock of the other carrier through the same subsidiary remained within the Act.

The Commission also emphasized the fact that, as the motor carrier business is now organized, purchase of the assets and franchises of carriers would be the usual and in many cases the only feasible method of acquiring control of them. It pointed out that many of the businesses are owned by individuals or partnerships, often possessing extensive operating rights. In the case of corporations their stock is usually closely held and they are without outstanding long-term debt obligations. In all these cases a simple and usual method of acquiring control of other carriers is by the cash purchase of their assets and operating rights and the assumption of their liabilities followed by liquidation of the vendor. The Commission concluded, "Proceeding thus through a controlled subsidiary, a non-carrier holding company, or others, may expand at will without becoming subject to our jurisdiction under the construction adopted by the division. We cannot agree to that construction of 'control' as used in the act". 39 M. C. C. at 275. For the reasons which we have stated we think the Commission's construction of the Act in this respect is correct.

The question remains whether the Commission had authority to proceed in the absence of any application by Union. By § 5(4) any transaction within the scope of subparagraph (a) of paragraph (2) is unlawful except as provided by that paragraph, which includes subparagraph (b). Section 5(2)(a), read with § 5(4),

requires the acquisition of control to be with the approval of the Commission. And § 5(2)(b) requires the "person" seeking authority for a transaction covered by subparagraph (a), here the non-carrier control of Marshall, to present an application to the Commission. The Commission may approve the application "subject to such terms and conditions and such modifications as it shall find to be just and reasonable". The purpose of these provisions of §§ 5(2)(b) and 5(4) is apparent when they are read with § 5(3), which authorizes the Commission, by its order permitting non-carrier control, to require such non-carrier to be considered a carrier subject to the Act to the extent provided in the order made in conformity to § 5(3).

The control over the non-carrier contemplated by § 5(3) can be acquired only if the non-carrier subjects itself to the jurisdiction of the Commission by filing its application with the Commission for its approval of such non-carrier control as is provided by § 5(2)(b). The purpose of § 5(3) to subject the non-carrier, thus acquiring control, to specified provisions of the Act would be defeated if the non-carrier were not to become subject to the Commission's order. That is avoided by making it unlawful to acquire non-carrier control save on the non-carrier's application to the Commission in conformity to § 5(2)(b). As appellees' application to the Commission involved the acquisition of non-carrier control of Marshall by Union, Union was a person seeking authority for such control and as such was required by § 5(2)(b) to make application to the Commission. To approve the transaction involving such non-carrier control without the application of the non-carrier would be to authorize Union's non-carrier control of Marshall without subjecting the former to the Commission's jurisdiction as required by § 5(3).

The Commission rightly concluded that it was without authority to approve such control unless Union, the non-carrier, filed its application with the Commission, and since Union failed to do so within the time allowed by the Commission's order, the Commission properly dismissed the pending application in which Union had failed to join. It was therefore error for the District Court to set aside the Commission's order, and the judgment of the District Court is

Reversed.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed for the reasons given by the District Court.